No. 08-1702

In The
Supreme Court of the United States

BRIAN EDWARD FRANKLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit improperly denied Petitioner's certificate of appealability to pursue relief based on actual innocence when a Texas district court held a post-conviction habeas hearing and found him actually innocent of the offense for which he is serving a life sentence, but the Texas Court of Criminal Appeals denied relief.

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OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's unreported per curiam denial of Petitioner's Petition for Rehearing En Banc, with Judge Garza dissenting, is attached as Appendix A. The Fifth Circuit Court of Appeals panel's unreported opinion denying Petitioner a certificate of appealability (COA), with Judge Garza dissenting, is attached as Appendix B. Fifth Circuit Court of Appeals Judge Clement's unreported order denying Petitioner a COA is attached as Appendix C. The Northern District of Texas United States District Court's unreported order adopting the findings, conclusions, and recommendation of the United States Magistrate Court, is attached as Appendix D and found at *Franklin v. Dretke*, No. 4:03-CV-934-A, 2004 WL 1109542 (N.D. Tex. May 17, 2004). The Northern District of Texas United States Magistrate Court's unreported findings, conclusions, and recommendation are attached as Appendix E and found at *Franklin v. Dretke*, No. 4:03-CV-934-A, 2004 WL 877677 (N.D. Tex. Apr. 22, 2004). The Texas Court of Criminal Appeals' 2002 opinion is reported at 72 S.W.3d 671 (Tex. Crim. App. 2002) and attached as Appendix F. The State district court's unreported supplemental and revised conclusions of law and order are attached as Appendix G. The Texas Court of Criminal Appeals' 2001 unreported per curiam opinion is attached as Appendix H. The State district court's unreported original findings of fact, conclusions of law, and order are attached as Appendix I.

JURISDICTION

The Fifth Circuit Court of Appeals panel entered judgment on February 16, 2005, and denied Petitioner's

timely petition for rehearing en banc on March 16, 2005. App. A, B. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). He invoked the federal district court's jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution and 28 U.S.C. §§ 2244, 2253(c) and 2254, attached as Appendix J.

STATEMENT OF THE CASE

This case involves whether Petitioner can pursue relief based on actual innocence when a State district court held an exhaustive hearing on his post-conviction habeas writ and found him actually innocent under *Herrera v. Collins*, 506 U.S. 390 (1993), of the offense for which he is serving a life sentence, but the Court of Criminal Appeals denied relief.

A. State proceedings

1. Trial proceedings

A Tarrant County, Texas, grand jury indicted Petitioner for the aggravated sexual assault of 13 year-old Brandi Rachall (the complainant). App. I; Cl. R. at 3, 6.

Petitioner pled not guilty and proceeded to a jury trial. Ct. R. vol. VII, at 149.[1]

[1] "Cl. R" refers to the State trial clerk's record. "Ct. R." refers to the State trial reporter's record while "H. Ct. R." refers to the State habeas reporter's record, which is included in the Fifth Circuit Court of Appeals record. The Court of Criminal Appeals did not disagree with the State district court's findings of the historical facts, unlike some of its other

(Continued on following page)

The prosecution pointed out that the case against Petitioner rested largely on the complainant's testimony and credibility. App. I. For example, the prosecution in summation largely focused on the complainant's truthfulness and argued: "[W]hat it boils down to is: Do you believe Brandi Rachall? When you set everything aside, do you believe Brandi Rachall?" App. I; Ct. R. vol. XI, at 10-18, 35-46.

Despite the complainant's being at the top of her junior high school class, her claims before and during trial included numerous inconsistencies about the perpetrator's identity, the alleged offense date, and the details surrounding the alleged offense. App. I; Ct. R. vol. VIII, at 49, 134-37; Ct. R. vol. IX, at 8, 149; Ct. R. vol. X, at 56; Ct. R. vol. XIII, at Ex. 2, 7. The testimony of numerous witnesses and the corroborative evidence suggested that Petitioner could not have committed the alleged offense on or about the alleged offense date. App. I; Ct. R. vol. VIII, at 165, 200-01; Ct. R. vol. IX, at 149; Ct. R. vol. X, at 33-34, 88; Ct. R. vol. XIII, at Ex. 9.

Before Petitioner's trial, the complainant repeatedly told prosecutors and investigators that she had never had sexual relations before Petitioner allegedly sexually assaulted her. App. I. At trial, she testified that she was a virgin before the alleged offense:

Q. Had you ever had sex before?

A. No.

Id.; Ct. R. vol. IX, at 161. The complainant's testimony suggested she was sexually naïve, without any interest in dating. Ct. R. vol. IX, at 137.

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factual findings and its legal conclusions, so the State district court's findings of historical facts are cited as support. *See* App. F, G, I.

To support the complainant's claim that she was sexually assaulted, the prosecution relied on testimony regarding two pieces of physical evidence: a pair of the complainant's bloodstained panties and Dr. Lamb's diagnosis of hymen damage. App. I. No semen, hair, or any other physical evidence of Petitioner was discovered or collected. *Id.*; Ct. R. vol. VIII, at 53. There were no eyewitnesses (besides the complainant) to the alleged offense. App. I; Ct. R.

Petitioner did not testify in guilt-innocence or sentencing. *See* Ct. R.

The jury found Petitioner guilty and sentenced him to life imprisonment. App. I; Cl. R., at 224-25.

2. Post-trial and habeas proceedings

In May 1998, the Tarrant County District Attorney's Office notified Petitioner's trial counsel that the complainant had recently claimed that she and John Guerrero, her stepfather, had regularly engaged in sexual relations for 11 years. App. I. Sent with the notification was the complainant's May 5, 1998, affidavit to police, swearing that John Guerrero had:

(1) Touched her inappropriately since she was at least 6 years old,

(2) "[P]laced his fingers inside [her] vagina" since she was 7 years old, and

(3) Begun penetrating her vagina with his penis on a daily basis since she was 11 years old, and stopped penetrating her March 1, 1998.

Id. The 11-year period of John Guerrero's continuous sexual relations with the complainant included the time before, during, and after the sexual assault that Petitioner was accused of committing on her. *Id.*

Petitioner's present counsel investigated this newly discovered evidence and obtained the affidavit of Rose Anna Salinas, who was the lead prosecutor in the case. Salinas swore in her affidavit that the complainant's allegations against John Guerrero:

(1) "[D]irectly contradict[ed]" what she told prosecutors and investigators before trial and her testimony at trial,

(2) "[R]ender[ed] irrelevant" Dr. Lamb's testimony about the hymen damage,

(3) Showed the complainant testified falsely at trial, and

(4) Raised "such serious doubts about Franklin's guilt" that the prosecutor would have "immediately dismissed" the charges against him.

In June 1999, Petitioner filed a State application for post-conviction writ of habeas corpus under Texas Code of Criminal Procedure Article 11.07 and Article V, Section 5 of the Texas Constitution. The basis of his application was actual innocence under the due process clauses of the United States and Texas Constitutions. The prosecution conceded a hearing was necessary to address "controverted, unresolved facts."

The Tarrant County district court in which Petitioner was convicted held a four-day habeas corpus hearing.

Petitioner called several witnesses, including Salinas.[2]

Salinas testified that she was a Tarrant County Assistant District Attorney for almost 10 years, five of

[2] Petitioner called John Guerrero but he invoked his constitutional right against self-incrimination and therefore never testified. *See* H. Ct. R.

which were in the Crimes Against Children Unit. H. Ct. R. vol. III, at 11-12. She stated that she had taught law enforcement, prosecutors, and child protective services about child abuse. H. Ct. R. vol. III, at 13-15. She explained that Texas child advocacy centers honored her as a top prosecutor in child abuse cases. H. Ct. R. vol. III, at 16.

Salinas testified that it is important for the prosecution to know the sexual history of a child claiming sexual abuse. H. Ct. R. vol. III, at 18. She explained that the "theory of . . . the prosecution all the way through" trial was that Petitioner caused the complainant's hymen damage. H. Ct. R. vol. III, at 22. Salinas said the prosecution wanted to establish that the complainant "was very sexually naïve and had no other experiences other than this sexual abuse by Brian Franklin." H. Ct. R. vol. III, at 25.

Salinas testified that Dr. Lamb's and the complainant's testimony were the "two important factors in obtaining a conviction" of Petitioner. H. Ct. R. vol. III, at 34. Salinas said that Dr. Lamb's trial testimony was based on the "false presumption" of the complainant's virginity. H. Ct. R. vol. III, at 20. Salinas felt Dr. Lamb's testimony regarding the hymen damage was particularly important given a delayed outcry and no trace evidence, such as semen or hair. H. Ct. R. vol. III, at 28-30. Salinas said that she would not have been able to offer Dr. Lamb's testimony in light of the complainant's allegations against John Guerrero. H. Ct. R. vol. III, at 32-33. Salinas stated: "My opinion is that we used evidence to convict Brian Franklin that we would have not been entitled to use. And that would have been basically the medical evidence." H. Ct. R. vol. III, at 68.

Salinas testified that an "ongoing sexual relationship with John Guerrero certainly would have affected" evidence of blood in the complainant's panties. H. Ct. R. vol.

III, at 59. Salinas said the blood evidence would have been inadmissible. *Id.*

Salinas testified that she pursued Petitioner's prosecution because she believed the complainant, even though Petitioner passed a polygraph showing he did not penetrate or sexually assault the complainant. H. Ct. R. vol. III, at 31-32, 53-54. Salinas explained that the complainant "was not at a very tender age at the time we went to trial. She was not that little. She knew the importance of what we were doing in this courtroom. Absolutely knew it. She's a very smart, intelligent girl." H. Ct. R. vol. III, at 31-32. Salinas testified: "If I found out in the middle of trial that she had been lying to me, I might have moved to dismiss the case. That's how serious I would have taken the lie." H. Ct. R. vol. III, at 37. In response to the State district court's question, Salinas said: " . . . what I'm saying is I might have moved to dismiss this case. And I'm very serious about the fact that that's a very strong possibility that would have happened." H. Ct. R. vol. III, at 71. Salinas testified that "I just know that I no longer find her [the complainant] credible" and that Salinas would not now prosecute Petitioner for the alleged offense. H. Ct. R. vol. III, at 57.

Salinas repeatedly testified that the complainant's false testimony about her sexual history affected the jury's verdict:

> Q. So then in your opinion did this false information that permeated the case – and I say permeated because everybody she [the complainant] talked to and asked the question she said the same thing, no other sex. Did this false information in your opinion affect the integrity of the jury verdict?
>
> A. Yes.

H. Ct. R. vol. III, at 38.

Q. . . . it's your opinion, isn't it, that the integrity of the jury verdict is adversely affected by the lack of this information?

A. Yes.

H. Ct. R. vol. III, at 56.

A. . . . the concern I have is how it affected this verdict. That's my concern.

H. Ct. R. vol. III, at 74.

Q. But the bottom line is this jury verdict cannot be trusted because of the false information, isn't that true?

A. That's true.

H. Ct. R. vol. III, at 75.

Salinas concluded: " . . . I think anybody who knows me knows that I take it very seriously when I ask a jury to send someone to prison for life. I have to be sure about my case. And I always prosecuted cases that way. And to find out years later that this information has now come forward and that there is someone in prison who possibly is innocent is very, very serious to me. So it goes beyond just being displeased with her [the complainant]." H. Ct. R. vol. III, at 61-62. Salinas continued: "I thought I could evaluate that case properly to prosecute it and obviously I was wrong. She [the complainant] fooled me." H. Ct. R. vol. III, at 62.

The State district court issued several pages of original findings of fact, conclusions of law, and order, with extensive citations to the trial and habeas record, recommending relief based on Petitioner's actual innocence. *See* App. I.

3. The Court of Criminal Appeals

In Texas, the State district court makes a recommendation to the Court of Criminal Appeals of whether post-conviction habeas relief should be granted. *See* TEX. CODE CRIM. PROC. ch. 11. In Petitioner's case, the Court of Criminal Appeals remanded the case so that the state district court would apply *Herrera*, 506 U.S. at 390, as the Court of Criminal Appeals interpreted it. App. H.

The State district court submitted supplemental and revised conclusions of law and an order, boldfacing that Petitioner was innocent: **"After examining the new evidence and considering the fact of perjury to determine what the jury would do in light of the complainant's lowered credibility, this Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."** App. G. **"After examining the new evidence without considering the fact of the complainant's perjury to determine what the jury would have done if it had heard 'the truth' the first time around at trial, this Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."** *Id.* **"The Court concludes that, in light of the new evidence, Applicant Franklin is being unlawfully confined and is constitutionally entitled to a new trial under *Elizondo*."** *Id.*[3]

[3] In *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996), the Court of Criminal Appeals applied *Herrera* and found a defendant, who filed an application for post-conviction writ of habeas corpus, actually innocent due to the complainant's recant in an aggravated sexual assault case. The Court of Criminal Appeals has arguably

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The Court of Criminal Appeals issued a published opinion in Petitioner's case. *See* App. F. Footnote 5 distilled the Court of Criminal Appeals' disagreement with the State district court: "We find in the present case that although the trial court properly applied the narrow holding of *Elizondo*, it failed to take into account its greater purpose." The Court of Criminal Appeals claimed that in a *Herrera*-type claim, where the applicant's conviction results from a constitutionally error-free trial, he must present "affirmative evidence" of his innocence. *Id.* at 677-678. The Court of Criminal Appeals cited no legal authority supporting this "affirmative evidence" holding. Citing *Schlup v. Delo*, 513 U.S. 298, 324 (1993), though, the Court of Criminal Appeals did set out examples of "affirmative evidence" in Footnote 7: "In addition to trustworthy witness recantations, other examples of such evidence may include exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence." *Id.* at 678. The Court of Criminal Appeals claimed that Petitioner "failed to present any new evidence aside from the fact that B.R. [the complainant] now alleges that she was also sexually assaulted by her stepfather. B.R. does not recant her trial testimony." *Id.*

The Court of Criminal Appeals opined that the new evidence in Petitioner's case was "limited to the impeachment of [the complainant's] claim that she did not have sexual relations with other men. It certainly calls into question her veracity in general, but only collaterally affects her accusation against applicant." *Id.* at 678. The Court of Criminal Appeals denied Petitioner relief because

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inconsistently applied *Herrera*. *See, e.g., Ex parte Stevens*, 963 S.W.2d 75 (Tex. Crim. App. 1997) (dissents from majority summarily denying relief in a virtually identical case to *Ex parte Elizondo*).

"[t]his evidence standing alone . . . is not dispositive of applicant's claim of innocence," since it did not affirmatively prove Petitioner's innocence. *Id.* at 678. The Court of Criminal Appeals failed to address federal cases, such as *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991) and *Richter v. Bartee*, 973 F. Supp. 1118 (D.Neb. 1997), that Petitioner repeatedly cited as support in his pleadings.

B. Federal proceedings

1. District court

After further investigating his case, including obtaining another polygraph Petitioner passed and an affidavit from a juror at Petitioner's trial who said he would acquit in light of the new evidence, Petitioner filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 in September 2003. Among other grounds, Petitioner explained that the Court of Criminal Appeals, in violation of 28 U.S.C. § 2254(d)(1): (1) examined "alone" the complainant's new claims against John Guerrero and therefore did not follow *Herrera*, and (2) held that the complainant's new allegations against stepfather John Guerrero only collaterally affected her credibility and did not affirmatively prove Petitioner's innocence. Petitioner also set out how the Court of Criminal Appeals, in violation of 28 U.S.C. § 2254(d)(2), did not properly defer to the State district court's actual innocence findings. Finally, he explained how actual innocence was an exception to the one-year statute of limitations for filing federal habeas petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.

Denying Petitioner's request for a hearing, the federal magistrate court issued findings, conclusions, and a

recommendation denying Petitioner relief.[4] App. E. Specifically, the federal magistrate court found that Petitioner had not shown his actual innocence under *Herrera* and that the one-year limitations required that his habeas petition be dismissed with prejudice. *Id.* The federal magistrate court held that Petitioner's actual innocence did not justify equitable tolling because no Fifth Circuit Court of Appeals opinion has "expressly" allowed this. *Id.*

Petitioner timely objected to the federal magistrate court's findings, conclusions, and recommendation.

Without a hearing, the federal district court overruled Petitioner's objections, found that he failed to prove his actual innocence as the Court of Criminal Appeals noted, and adopted the federal magistrate court's findings, conclusions, and recommendation. App. D.

Petitioner sought a COA in federal district court, explaining how "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling" regarding his actual innocence and the one-year limitations. The federal district court denied a COA.

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[4] While the *Herrera* majority opinion could be read as barring a bare innocence claim in federal courts because it does not involve a constitutional violation, the *Herrera* concurrence suggests and the Texas Court of Criminal Appeals has held that such a claim implicates the due process clause of the United States Constitution. *See Elizondo*, 947 S.W.2d at 204. Federal courts in Petitioner's case addressed his actual innocence because it was raised in the context of 28 U.S.C. § 2254(d).

2. The Fifth Circuit Court of Appeals

Petitioner sought a COA in the Fifth Circuit Court of Appeals. Judge Clement denied the COA. *See* App. C.

Petitioner then filed a motion for panel rehearing and a divided panel issued an opinion. Judges Clement and DeMoss issued a majority opinion denying Petitioner a COA. App. B. The panel majority reiterated that a "claim" of actual innocence does not toll the one-year limitations under AEDPA. *Id.* The panel majority continued: "Although this Court has not decided whether a *showing* of actual innocence will toll the limitations period, *see, e.g.*, *Molo v. Johnson*, 207 F.3d 773, 775 (2000), the instant case is not an appropriate vehicle for such a determination. . . . Franklin's newly discovered evidence, which tends to undermine the credibility of a key witness from his trial, does not rise to the level of a showing of actual of (*sic*) innocence." *Id.* (emphasis in original).

Judge Garza's dissent pointed out that the State district court signed "extensive" orders setting out Petitioner's innocence: "The trial court's opinion . . . included an extensive analysis and explanation of its findings and how the new evidence not only affected the alleged victim's credibility, but also most of the other evidence presented at trial. The trial court also included the testimony of the lead prosecutor demonstrating her concern with Petitioner's conviction in light of the new evidence." *Id.* Unlike the majority, Judge Garza referred to and incorporated the COA standard in his opinion. *Id.* Judge Garza explained why Petitioner should receive a COA: "This court has not determined whether a showing of factual innocence could toll the limitations period" and "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Judge Garza's

opinion concluded citing *Lonchair v. Thomas*, 517 U.S. 314, 324 (1996): "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.*

Petitioner filed a motion for rehearing en banc, which was denied with Judge Garza again dissenting. App. A.

REASONS FOR GRANTING THE PETITION

This Court should grant Petitioner's petition for certiorari because:

1. The Fifth Circuit has entered a decision in conflict with the decision of other United States courts of appeals on the same important matters of the *Schlup* and *Herrera* actual innocence standards and of whether actual innocence is an exception to the one-year limitations under AEDPA.

2. The Court of Criminal Appeals has decided the important federal question of applying the *Schlup* and *Herrera* actual innocence standards in a way that conflicts with the decision of United States courts of appeals.

3. The Fifth Circuit and the Court of Criminal Appeals have decided the important federal question of whether Petitioner has shown his actual innocence under *Schlup* and *Herrera* in a way that conflicts with relevant decisions of this Court.

4. The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, in denying Petitioner's COA when a State district court found him

actually innocent, as to call for an exercise of this Court's supervisory power.

5. The Fifth Circuit has decided the important question of federal law of whether actual innocence is an exception to the one-year limitations under AEDPA that has not been, but should be, settled by this Court.

See SUP. CT. R. 10.

A. The Fifth Circuit and Court of Criminal Appeals have decided important federal questions and entered decisions of whether Petitioner has shown his actual innocence under *Schlup* and *Herrera* in a way that conflicts with this Court and other United States courts of appeals

1. Introduction

This Court has repeatedly pointed out that "the central purpose" of criminal justice "is to convict the guilty and free the innocent." *Herrera*, 506 U.S. at 859. "Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Schlup*, 513 U.S. at 325 (citations omitted). In this context, no legal distinction exists between sentencing a prisoner to death or a term of imprisonment: "It would be a rather strange jurisprudence . . . that under our Constitution [the actually innocent] could not be executed, but that he could spend the rest of his life in prison." *Herrera*, 506 U.S. at 405.

The "principal" purpose of habeas corpus is "to serve as a bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). The

"Great Writ" of habeas corpus is "the most celebrated writ in the English law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity . . . " *Fay v. Noia*, 372 U.S. 391, 400 (1962), overruled on other grounds, *Coleman v. Thompson*, 501 U.S. 722 (1991). "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired and unsuspended, save only in the cases specified in our Constitution.'" *Id.* (citations omitted). Habeas corpus is based on the principle that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office." *Id.* at 402.

Actual innocence claims in habeas petitions are categorized as either a *Herrera* or a *Schlup* claim. A *Herrera* claim involves a substantive claim in which the petitioner asserts a bare claim of innocence. *Schlup*, 513 U.S. at 314. A *Schlup* claim, on the other hand, is a procedural claim in which the petitioner's claim of innocence does not alone provide a basis for relief but is a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits. *Id.*

Society has an interest in finality, comity, and conservation of scarce judicial resources, as reflected in AEDPA. *Id.* at 317-19. But this interest must give way to a petitioner who is actually innocent. *Id.* at 320-21. "Explicitly tying the miscarriage of justice exception to innocence

thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" *Id.* at 322 (citations omitted).

2. Conflict with this Court and other United States courts of appeals

Relying on *Schlup v. Dèlo*, 513 U.S. 298, 324 (1993), the Court of Criminal Appeals claimed that Petitioner "failed to present any new evidence" besides the complainant's allegation against her stepfather, which "certainly calls into question her veracity in general, but only collaterally affects her accusation against applicant." App. F at 678. The Court of Criminal Appeals denied Petitioner relief because "[t]his evidence standing alone . . . is not dispositive of applicant's claim of innocence," since it did not affirmatively prove Petitioner's innocence. *Id.* The Court of Criminal Appeals cited no legal authority supporting this "affirmative evidence" holding. The Fifth Circuit affirmed the Court of Criminal Appeals' reasoning. App. B.

"Affirmative evidence" and "new evidence" of innocence are dealt with in turn.

a. "Affirmative evidence of applicant's innocence"

Nothing in *Herrera* or *Schlup* requires "affirmative evidence of applicant's innocence." *Schlup* included "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," as examples of "new reliable evidence," but also held "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments."

Schlup, 513 U.S. 298, 324-25, 330. Further, this Court has observed that the "jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . " *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

Federal appeals courts have held that *Schlup* extends to witness credibility. For example, in *Souter v. Jones*, 395 F.3d 577, 580 (6th Cir. 2005), Souter was charged with murder. The deceased was found with lacerations on her forehead, which led a police detective to believe someone murdered her with a sharp-edged instrument. *Id.* at 581-82. The medical examiner and other forensic pathologists agreed with the police detective. *Id.* at 582. The prosecutor's experts said the deceased's injuries were consistent with a sharp-edged instrument, like a glass bottle, but a defense expert said a passing vehicle, not a sharp-edged instrument, caused the fatal injuries. *Id.* at 583. Nevertheless, the jury convicted Souter of second-degree murder. *Id.* at 577.

Three years after his conviction, Souter filed a motion for new trial based on new evidence of actual innocence. *Id.* The State courts found he failed to meet his burden and affirmed his conviction. *Id.*

A year after losing his direct State appeal, Souter filed a habeas corpus petition under 28 U.S.C. § 2254 based on new evidence of actual innocence, which included:

(1) An affidavit from a prosecution expert at trial concluding (inconsistently from his testimony) that "it is unlikely" a bottle caused the deceased's injuries,

(2) Affidavits from police and private investigators stating the bottle recovered did not have a sharp edge, and

(3) Photos of blood on the deceased's clothing that were not presented at trial and that suggested a car struck the deceased.

Id. at 583-84.

The federal magistrate court found that Souter's new evidence "chips away at the rather slim circumstantial evidence upon which the petitioner was convicted" and "is sufficient for the limited purpose of equitably tolling the statute of limitations and permitting the court to reach the merits of the claim." *Id.* at 584. The federal district court denied relief because Souter failed to establish his actual innocence since "none of [his new] evidence conclusively establishes that the bottle could not have inflicted the wounds on the victim." *Id.* The Court of Criminal Appeals and federal courts used similar language to deny Petitioner relief.

In a well-reasoned, lengthy opinion, a Sixth Circuit panel unanimously held: "A correct reading of *Schlup* reveals that examples following the words 'new reliable evidence' were not meant to be an exhaustive list of everything upon which an actual innocence claim may be based. The Court in *Schlup* specifically stated that 'the newly presented evidence may call into question the credibility of the witnesses presented at trial.'" *Id.* at 593. The Sixth Circuit found that Souter showed his actual innocence, which tolled the one-year limitations under AEDPA. *Id.* at 596-601.

In *Gandarela v. Johnson*, 286 F.3d 1080, 1086 (9th Cir. 2002), a Ninth Circuit panel unanimously held: "In seeking to prove actual innocence, to avoid a procedural default, a petitioner for a writ of habeas corpus need not always affirmatively show physical evidence that he or she did not commit the crime with which he or she is charged. *Rather, a petitioner may pass through the Schlup gateway*

by promulgating evidence that significantly undermines or impeaches the credibility of witnesses presented at trial. . . . " (emphasis added).

Lewis, 946 F.2d at 1361, which Petitioner cited below but the Court of Criminal Appeals and federal courts failed to address, is an Eighth Circuit pre-*Herrera* case that has been approvingly cited in post-*Herrera* and *Schlup* cases. *See, e.g., United States v. Dogskin*, 265 F.3d 682 (8th Cir. 2001). In *Lewis*, both Lewis and Carter were charged with raping the complainant. *Lewis*, 946 F.2d at 1361-62. Lewis was convicted of rape and Carter proceeded to trial. *Id.* at 1362. The complainant recanted her identification of Carter early in his trial. *Id.* at 1362. Lewis appealed and the Minnesota Court of Appeals concluded, like the Court of Criminal Appeals and federal courts in Petitioner's case, that the recanted testimony would not produce a different result on retrial because the recantation could only be used to impeach the complainant rather than to show Lewis' innocence. *Id.*

Lewis lost his direct State appeal and filed a habeas corpus petition under 28 U.S.C. § 2254 based on new evidence of actual innocence. *Id.* at 1361. Relying on the Minnesota Court of Appeals decision, the federal magistrate court issued a report recommending denial of Lewis' petition. *Id.* at 1362. The federal district court adopted the magistrate judge's recommendation and denied Lewis' petition. *Id.* The Eighth Circuit unanimously held: "Recanted testimony, however, is grounds for relief from a conviction when it either bears on a witness's credibility or directly on the defendant's guilt." *Id.* (citing *Williams v. Griswald*, 743 F.2d 1533, 1541 (11th Cir. 1984) and *Napue v. Illinois*, 360 U.S. 264, 269 (1959)). "We think a comparison of the victim's earlier testimony that there was 'no doubt in her mind' Lewis and Carter attacked her with her later recantation would destroy her credibility in the jury's

eyes," the Eighth Circuit explained in reversing the lower courts and granting a new trial. *Id.* "Considering the link between the two men established by both the victim and Lewis himself, we think the victim's recantation of Carter's identification casts serious doubt on the credibility of her identification of Lewis. Given the victim's recantation, we do not believe a second jury would convict Lewis." *Id.* at 1362-63.

While not a federal appeals court case, *Richter v. Bartee*, 973 F. Supp. 1118 (D. Neb. 1997), is factually similar to Petitioner's case and indicates how a federal district court reached an opposite conclusion. Petitioner cited *Richter* below but the Court of Criminal Appeals and federal courts failed to address it. Richter was charged with sexual assault. *Id.* No eyewitness saw the alleged offense and no 'trace evidence,' such as fibers or DNA, was recovered. *Id.* at 1120. The complainant claimed that she did not have sexual relations with anyone for at least six weeks before the alleged offense. *Id.* She identified Richter as the person who raped her. *Id.* at 1121. Richter called an alibi witness at trial to establish that Richter could not have raped the complainant. *Id.* "Simply put, the only evidence that Richter committed this rape, or that the victim was ever raped by anyone, derives from the victim." *Id.* at 1125. Nevertheless, a jury convicted Richter of sexual assault. *Id.*

Richter lost his direct State appeal and filed a habeas corpus petition under 28 U.S.C. § 2254 based on new evidence of actual innocence. *Id.* at 1121-22. The new evidence included forensic testimony about the complainant's wounds being self-inflicted, psychiatric testimony about her having a severe personality disorder, and evidence that the complainant lied about her sexual history. *Id.* at 1122-23. The federal district court granted Richter relief because "if this case were retried at this

time, [the complainant] would have to testify as the prosecuting witness. . . . Apart from [her], there is virtually no evidence, physical or otherwise, that Richter raped her. Upon retrial her credibility would most assuredly be attacked." *Id.* at 1130. The court declared: "Without her testimony as a credible witness, it is inconceivable that petitioner would be convicted." *Id.* The court concluded: "My review of the evidence adduced at the hearing before me leads me to conclude that petitioner has more than met the test set out by the Supreme Court in *Schlup*. Indeed, in my opinion *it is an understatement to say that 'it is more likely than not 'no reasonable juror' would have convicted him.'*" *Id.* (emphasis added).

b. "New evidence"

The Court of Criminal Appeals held that an "applicant asserting a *Herrera*-type claim must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the newly discovered evidence," and that Petitioner "failed to present any new evidence" besides the complainant's allegations against John Guerrero. App. F at 677-78 (emphasis in original). The Court of Criminal Appeals failed to factor into the innocence equation the evidence that, while not newly discovered, was newly presented and that the State district court found supported Franklin's innocence, such as:

(1) Witness testimony and corroborative evidence, namely Petitioner's sales receipts and telephone bill records, proving that he was never with the complainant on or about the alleged offense date.

(2) Salinas' testimony that the relevance of the bloodstained underwear and hymen damage depended on the complainant's repeated lies

about her sexual history before and during trial.

(3) Evidence that the complainant's nightmares, migraines, counseling, and change in dress did not result from Petitioner's alleged sexual assault.

See App. F-I.

The *Schlup* majority discusses *Herrera* at length, including the differences between a *Schlup* and *Herrera* claim, but never states that actual innocence claims have to be based on newly discovered – as opposed to new reliable – evidence. *Schlup*, 515 U.S. at 315-16. In fact, the *Schlup* majority only refers to "new reliable" and "newly presented" evidence. *Id.* at 324, 330, 332. The *Schlup* majority explained: "In assessing the adequacy of petitioner's showing [of actual innocence], the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327. Indeed, this Court remanded Schlup's case because of compelling exculpatory statements from witnesses who were available at trial but who the defense failed to interview or call.[5] *Id.* Citing *Schlup*, this Court held: "'To be credible,' a claim of actual innocence must be based on reliable evidence not presented at trial." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998).

[5] On remand the district court held an evidentiary hearing and found that *Schlup* had made a sufficient showing of actual innocence to entitle him to a hearing on his barred claims. *Schlup v. Delo*, 912 F.Supp. 448, 455 (E.D.Mo. 1995). Chief Judge Hamilton subsequently concluded in an unpublished order that Schlup had been denied effective assistance of counsel at trial and that his writ should be granted. *Amrine v. Bowersox*, 128 F.3d 1222, 1228 (8th Cir. 1997).

This is logical because a *Herrera* claim requires a higher burden of proof than a *Schlup* claim. Limiting a petitioner with a *Herrera* claim to only newly discovered evidence would make it unreasonably onerous on him.

In *Souter*, the Sixth Circuit held that newly presented evidence does not mean newly discovered. *Souter*, 395 F.3d at 595, n. 9. Thus, in determining the petitioner's innocence, the Sixth Circuit considered the photographs of the deceased's bloody shirt, because they were never presented to the jury even though available. *Id.*

In the recent decision, *United States v. Davies*, 394 F.3d 182, 191 n. 8 (3rd Cir. 2005), a unanimous Third Circuit panel pointed out that "'new evidence' in the innocence context does not necessarily mean 'newly discovered' evidence." The Third Circuit panel cited two other federal appeals courts for the conclusion that "*Schlup* allows a petitioner to offer 'newly presented' evidence (that is, evidence that was not presented to the trier of fact)" and that "a petitioner is not limited to offering only 'newly discovered' evidence (that is, evidence discovered post-conviction)" (citing *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003) and *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003)). *Id.* But the Third Circuit held that procedural reasons prevented it from deciding the 'newly presented' versus 'newly discovered' issue. *Id.*

In *Gomez*, the "Respondent argue[d] that this evidence cannot be considered new because it [was] not newly discovered, *i.e.*, Gomez was aware of its existence at the time of trial." *Id.* at 679. But the Seventh Circuit held "nothing in *Schlup* indicates that there is such a strict limitation on the sort of evidence that may be considered in the probability determination. All *Schlup* requires is that the new evidence is reliable and that it was not

presented at trial." *Gomez*, 350 F.3d at 679 (citing *Schlup*, 513 U.S. at 324 and *Calderon*, 523 U.S. at 559).

Gomez, though, cites *Herrera* for the proposition that "a petitioner claiming that his factual innocence alone entitles him to habeas corpus relief must present newly discovered evidence," which seemingly contradicts the language in *Calderon* stating that actual innocence claims (without distinguishing between a *Schlup* and *Herrera* claim) "must be based on reliable evidence not presented at trial." *Calderon*, 523 U.S. at 559.

Following a detailed discussion of *Schlup*, including Justice O'Connor's concurrence, a unanimous Ninth Circuit panel in *Griffin* held that *Schlup* requires newly presented, not newly discovered, evidence of innocence. *Griffin*, 350 F.3d at 961-62.

However, an Eighth Circuit panel has unanimously held just the opposite: "The sort of evidence that cannot be used for a *Schlup* gateway claim includes 'evidence [that] could have been discovered earlier in the exercise of due diligence.'" *Nance v. Morris*, 392 F.3d 284, 291 (8th Cir. 2004) (quoting *Cornell v. Nix*, 976 F.2d 376, 380 (8th Cir. 1992) (en banc); *accord Meadows v. Delo*, 99 F.3d 280, 282 (8th Cir. 1996)).

B. The Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, in denying Petitioner's COA when a State district court found him actually innocent, as to call for an exercise of this Court's supervisory power.

A COA must issue if a petitioner makes a substantial showing of a denial of a constitutional right. 28 U.S.C. § 2253(c)(2). A "substantial showing" includes issues that

are debatable among jurists of reason, that another court could resolve differently, that are suitable enough to deserve encouragement to proceed further, that are not squarely foreclosed by an authoritative court decision, or that are not lacking any factual basis in the record. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880, 893-94 (1983) (citations omitted).

This Court has held that when a federal district court rejects a prisoner's constitutional claims on the merits, a COA must issue if he demonstrates that reasonable jurists would find the federal district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When the federal district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a COA must issue if the petitioner shows that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and debatable whether the federal district court was correct in its procedural ruling. *Id.*

In defining "substantial showing," this Court has admonished courts that they may not deny COA simply because the habeas petition has been denied on the merits: "Obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 n. 4 (citations omitted). Thus, this Court has warned: "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.*

In denying Petitioner relief, the Fifth Circuit panel majority misconstrued the standard for the COA. The panel majority focused not on whether "reasonable jurists" could debate but on its own conclusion that Petitioner's

claim lacked merit. *See* App. B. Unlike Judge Garza's dissent, the panel majority never referred to the standard for a COA. *Id.* The panel majority merely held that Petitioner failed to adequately prove his innocence. *Id.* The panel majority therefore held that Petitioner's case was not "an appropriate vehicle" to determine whether an actual innocence showing – as opposed to a mere claim – would toll the one-year limitations under AEDPA. *Id.*

The Fifth Circuit panel majority also disregarded 28 U.S.C. § 2254(e)(1), which states in part that "a determination of a factual issue made by a State court shall be presumed correct," unless clear and convincing evidence rebuts this presumption. Federal courts must presume correct the State district court's – not the Court of Criminal Appeals' – explicit and implicit factual findings and credibility determination when the trial court held a full and fair live evidentiary hearing. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Craker v. Procunier*, 756 F.2d 1212 (5th Cir. 1985). Federal courts cannot reject the State district court unless they "conclude that the state [district] court's findings lacked even 'fair support' in the record." *See, e.g., Marshall v. Longberger*, 459 U.S. 422, 432-34 (1983).

In Petitioner's case, the State district court held a habeas corpus hearing that spanned several days and included many exhibits and witnesses, including Petitioner, Salinas, and the complainant and her family. *See* App. G and I. Based on all of this evidence, along with the witnesses' demeanor, the State district court made extensive written factual findings and legal conclusions, replete with record citations, finding Petitioner actually innocent. *Id.* The State district court implicitly and explicitly found that the evidence proved Petitioner was not present with the complainant at the time of the alleged offense. *Id.* The State district court found that the complainant's perjury,

given the tenuous trial evidence, struck at the heart of the prosecution's case and proved Petitioner's innocence. *Id.* The State district court hardly considered this crucial evidence of perjury as just "a collateral matter," as the Court of Criminal Appeals and federal courts did. *Id.* In granting relief based on Petitioner's actual innocence, the State district court suggested that all of the complainant's trial testimony was false and that she had no credibility. *Id.*

In the Fifth Circuit, Judge Garza's dissent pointed out that the State district court signed "extensive" orders setting out Petitioner's innocence. *See* App. B. Judge Garza correctly held that Petitioner should receive a COA. *Id.* Indeed, the fact that a Fifth Circuit judge dissented indicates "reasonable jurists" could debate whether Petitioner's actual innocence tolled the one-year limitations under AEDPA.

C. The Fifth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter of whether actual innocence is an exception to the one-year limitations under AEDPA, and has decided an important question of federal law that has not been, but should be, settled by this Court.

The Fifth Circuit panel majority refused to rule on whether an actual innocence showing – as opposed to a mere claim – would toll the one-year limitations under AEDPA. Petitioner has already explained how the Court of Criminal Appeals and federal courts erred in disregarding the State district court's findings and in holding that he did not prove his innocence. Judge Garza's dissent correctly held that "reasonable jurists" could debate whether

Petitioner's actual innocence tolled the one-year limitations under AEDPA.

The Fifth Circuit panel majority's holding on the one-year limitations conflicts with other appeals courts. The Second, Third, Seventh, Eighth, Ninth, and District of Columbia Circuits have not held whether actual innocence tolls the limitations. The Fourth Circuit in *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir. 2003) has held that actual innocence does not toll the limitations. But the First Circuit in *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003), the Sixth Circuit in *Souter*, 395 F.3d at 577, the Tenth Circuit in *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003), and the Eleventh Circuit in *United States v. Montano*, 398 F.3d 1276, 1285 (11th Cir. 2005), have held that actual innocence does toll the limitations.

Absent an actual innocence exception, AEDPA would give rise to serious questions regarding the Suspension Clause under Article I, Section 9, the Due Process Clause under the Fifth and Fourteenth Amendments, and the Cruel and Unusual Punishment Clause under the Eighth and Fourteenth Amendments of the United States Constitution.

This Court has repeatedly held that a claim that is procedurally defaulted at the State level can still be reviewed federally if failure to address its merits would lead to a "miscarriage of justice." *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Courts have not clearly defined "miscarriage of justice," but it at least extends to "actual innocence." *See, e.g., Schlup*, 513 U.S. at 324-26; *Herrera*, 506 U.S. at 390. A petitioner's demonstration of factual innocence can bypass procedural default due to failure to exhaust State remedies. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Schlup*, 513 U.S. at 324-26. It would make little sense for there to be an actual innocence exception to a State procedural

default bar but not to the one-year limitations bar under AEDPA.

CONCLUSION

The petition for writ of certiorari therefore should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10641

BRIAN EDWARD FRANKLIN

Petitioner-Appellant

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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(Filed Feb. 16, 2005)

Before GARZA, DEMOSS, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Brian Edward Franklin was convicted of aggravated sexual assault of a child under age 14 years and was sentenced to life imprisonment. Franklin now seeks a certificate of appealability ("COA") to pursue his claim of actual innocence. His claim previously was denied by a member of this panel and Franklin sought reconsideration. A majority of the panel now affirms that denial.

Franklin identifies four issues for appeal: (1) whether the district court erred in affirming the Texas Court of

Criminal Appeals that his new evidence did not constitute actual innocence; (2) whether the district court erred in failing to rebut the state trial court's finding of actual innocence; (3) whether Franklin's claim of actual innocence tolled the federal limitations period; and (4) whether the district court erred in finding that the federal limitations period began to run in May, 1998 rather than March, 2003.

This Court need only address the issues of procedural default. A one-year limitations period applies to the filing of habeas petitions by state prisoners. 28 U.S.C. 2244(d)(1)(A)-(D) (stating the one-year limitations period will begin on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). Franklin maintains that the factual predicate to his claim of actual innocence occurred in March, 2003, when Franklin obtained an affidavit from a juror at his trial. In the affidavit, the juror averred that he would have voted to acquit Franklin had he known that a key witness had perjured herself. In fact, the factual predicate to Franklin's claim of actual innocence occurred when Franklin became aware of the witness's false testimony in May, 1998. The limitations period does not provide for extra time for an applicant to gather evidence to support his claim. *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). Franklin's habeas petition was filed September 9, 2003 and therefore is time barred.

A claim of actual innocence does not toll the federal limitations period for habeas petitions. *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). Although this Court has not decided whether *a showing* of actual innocence will toll the limitations period, *see, e.g., Molo v. Johnson*, 207 F.3d

773, 775 (2000), the instant case is not an appropriate vehicle for such a determination. For a trial free of constitutional error, a habeas petitioner must do more than raise doubt as to whether the jury would re-convict him given newly discovered evidence. *See, e.g., Schlup v. Delo*, 513 U.S. 298, 315-16 (1995) (citing *Herrera v. Collins*, 506 U.S. 390, 419 (1993)). Rather, petitioner's newly discovered evidence must affirmatively show his innocence, such as the recantation of a key witness or exculpatory evidence. *Schlup*, 513 U.S. at 324. Franklin's newly discovered evidence, which tends to undermine the credibility of a key witness from his trial, does not rise to the level of a showing of actual of innocence.

IT IS ORDERED that the motion is DENIED.

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that petitioner, Brian Edward Franklin, filed an untimely petition. I do not agree, however, with the majority's denial of COA on Franklin's claim that actual innocence entitled him to equitable tolling of the limitations period.

The general rule is that a declaration of actual innocence does not constitute a "rare and exceptional" circumstance, as required by *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998), that entitles a petitioner to invoke equitable tolling to avoid a procedural limitations bar. *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). However, in *Felder*, we noted that the petitioner had "not made a *showing* of actual innocence." *Id.* at 171 n. 8 (emphasis in original). In *Molo v. Johnson*, 207 F.3d 773, 775 (5th cir.

2000) this court did not answer the question of whether proof of factual innocence would toll the limitations period because it held that the petitioner had failed to demonstrate actual innocence. Relying on this footnote in *Felder*, the district court in *Alexander v. Johnson* held that equitable tolling is permitted if a petitioner *demonstrates* actual innocence. 217 F.Supp.2d 780, 791-92 (S.D. Tex. 2001) ("In the context of a claimed procedural default, a petitioner is excused from complying with state procedural requirements if he 'can make a persuasive showing that he is actually innocent of the charges against him,' because to hold otherwise would effect 'fundamental miscarriage of justice.'") (quoting *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001)).

The district court rejected Franklin's attempt to distinguish between an "unsupported claim of actual innocence" and a "colorable claim of innocence." Franklin has not simply declared his innocence. The trial court, after an extensive hearing, concluded that Franklin should receive a new trial. The court concluded that Franklin had "shown through clear and convincing evidence, that [the victim's] lies and perjury regarding her sexual history, superimposed over the weak inculpatory evidence at his trial, create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial." The trial court in its extensive order stated that the new evidence created doubt as to the efficacy of the jury's verdict. The Texas Court of Criminal Appeals, however, remanded because the trial court had misstated the standard of review. In a supplemental opinion, the trial court again concluded that "Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."

The trial court's opinion again included an extensive analysis and explanation of its findings and how the new evidence not only affected the alleged victim's credibility, but also most of the other evidence presented at trial. The trial court also included the testimony of the lead prosecutor demonstrating her concern with Franklin's conviction in light of the new evidence.

The district court correctly stated that no Fifth Circuit case law expressly requires that a distinction be made between an unsupported claim of actual innocence and a colorable claim of innocence. *Franklin v. Dretke*, No. CIV.A.4:03-CV-934-A, 2004 WL 877677, at *3 n. 3 (N.D. Tex. April 22, 2004). This court has not determined whether a showing of factual innocence could toll the limitations period. I believe that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Therefore, I respectfully dissent and would grant Franklin a COA.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10641
USDC No. 4:03-CV-934-A

BRIAN EDWARD FRANKLIN,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Oct. 20, 2004)

ORDER:

Brian Edward Franklin, Texas prisoner # 703704, seeks a certificate of appealability ("COA") to appeal the dismissal of his 28 U.S.C. § 2254 application in which he attacked his 1995 conviction for sexual assault of a child under age 14 years of age. The district court concluded that Franklin's application was untimely.

A COA may be issued only if Franklin has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's dismissal

is on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Franklin argues that the limitations period did not begin to run until March 2003, when he obtained an affidavit from a trial juror, and that his claim of actual innocence entitled him to equitable tolling of the limitations period. Franklin has not shown that reasonable jurists would find the district court's resolution of his claims debatable or wrong. *See Slack*, 529 U.S. at 484. His request for a COA is DENIED.

/s/ Edith Brown Clement
EDITH BROWN CLEMENT
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION.

BRIAN EDWARD FRANKLIN, Petitioner	§	
VS.	§	
DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	NO. 4:03-CV-934-A
Respondent.	§	

ORDER

(Filed May 17, 2004)

Came on for consideration the above-captioned action wherein Brian Edward Franklin is petitioner and Douglas Dretke, Texas Department of Criminal Justice, Correctional Institutions Division, is respondent. This is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. On April 22, 2004, the United States Magistrate Judge issued his proposed findings, conclusions, and recommendation ("FC&R"), and ordered that the parties file objections, if any, thereto by May 13, 2004. On May 7, 2004, respondent filed his objections. And, on May 13, 2004, petitioner filed his objections. In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the court makes a *de novo* determination of those portions of the proposed findings or recommendations to which specific objection is made. *United States v. Raddatz*, 447 U.S. 667 (1980). The court is not addressing any nonspecific objections or any frivolous

or conclusory objections. *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

Respondent objects to the magistrate judge's recitation that limitations began to run on May 15, 1999, and expired one year later on May 15, 2000. FC&R at 5. As respondent points out, the record reflects that limitations began to run on May 15, 1998, when petitioner's counsel received notice from the State that a key witness had perjured herself at trial. The one-year period expired on May 15, 1999. 28 U.S.C. § 2244(d)(1)(D).

Petitioner objects to the magistrate judge's finding that his habeas petition was untimely. He urges that limitations did not begin to run until March 2003, when he obtained a juror's affidavit to support his claims. Limitations runs, however, from the time when the petitioner knows the factual predicate of his claims. *See Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998). Here, the factual predicate was known in May 1998. The time spent gathering evidence does not change the character of petitioner's claim of actual innocence or provide any new ground for his federal habeas petition. *Id.* Petitioner's attempt to distinguish *Flanagan* is without merit. Finally, petitioner urges that limitations must be tolled because he is actually innocent. As noted by the Court of Criminal Appeals of Texas, however, the "newly discovered evidence" does not establish petitioner's actual innocence, but only impeaches the trial testimony of the victim. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002). Although petitioner's victim had also been sexually assaulted by her stepfather, she testified at the habeas hearing, consistent with her trial testimony, that she had been sexually assaulted by petitioner. *Id.*

As noted herein, the court accepts the findings, conclusions and recommendation of the magistrate judge and ORDERS that the petition in this action be, and is hereby, dismissed as untimely.

SIGNED May 17, 2004.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

IN THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION.

BRIAN EDWARD FRANKLIN,	§	
Petitioner	§	
	§	
VS.	§	
	§	
DOUGLAS DRETKE,	§	
DIRECTOR, TEXAS	§	NO. 4:03-CV-934-A
DEPARTMENT OF CRIMINAL	§	
JUSTICE, CORRECTIONAL	§	
INSTITUTIONS DIVISION,	§	
	§	
Respondent.	§	

FINAL JUDGMENT

(Filed May 17, 2004)

In accordance with the court's order of even date herewith,

The court ORDERS, ADJUDGES, and DECREES that the petition of Brian Edward Franklin for writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and is hereby, dismissed as untimely.

SIGNED May 17, 2004.

/s/ John McBryde
JOHN McBRYDE
United States
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRIAN EDWARD FRANKLIN,	§	
	§	
Petitioner,	§	**Civil Action No.**
	§	**4:03-CV-934-A**
v.	§	
	§	
DOUGLAS DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,	§	
	§	
	§	
	§	
	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND NOTICE AND ORDER

(Filed Apr. 22, 2004)

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge are as follows:

I. FINDINGS AND CONCLUSIONS

A. NATURE OF THE CASE

This is a petition for writ of habeas corpus by a state prisoner under 28 U.S.C. § 2254.

B. Parties

Petitioner Brian Edward Franklin, Prisoner No. 703704, is in custody of the Texas Department of Criminal Justice, Correctional Institutions Division, and is presently incarcerated in Rosharon, Texas.

Respondent Douglas Dretke is the Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

C. Factual and Procedure History

Franklin was charged in the underlying state criminal case with aggravated sexual assault of B.R., a child younger than fourteen years of age. (Pet'r Second Amended Petition at Appendix 1.) On February 24, 1995, a jury found Franklin guilty of the charged offense, and, on February 25, 1995, it assessed his punishment at life imprisonment. (*Id.*) The Second District Court of Appeals of Texas affirmed the trial court's judgment of conviction on October 17, 1996. *Franklin v. Texas,* No. 2-95-084-CR (Tex. App. – Fort Worth Oct. 17, 1996) (not designated for publication). In turn, the Texas Court of Criminal Appeals refused his petition for discretionary review on February 26, 1997. *Franklin v. Texas,* PDR No. 157-97. Franklin did not seek writ of certiorari. (Original Petition at 3.)

On May 15, 1998, the state prosecutor sent a letter to Franklin's trial counsel, in which she enclosed "various affidavits, police investigation notes, and other information" that she indicated "may or may not concern" Franklin's case. (Pet'r Second Amended Petition at 9; State Habeas R. at 32.) Among the documents was an affidavit by B.R. in which she stated that she had been sexually assaulted by her step-father on numerous occasions before,

during, and after the assault by Franklin. (State Habeas R. at 34-35.) This statement conflicted with B.R.'s testimony at trial that she had never had sex before the assault by Franklin. (*Id.* at 18.)

On June 8, 1999, Franklin filed a state application for writ of habeas corpus based on the newly discovered evidence, which he argued was proof of his actual innocence of the crime. *Ex parte Franklin*, Application No. 44,521-01. The state habeas application was eventually denied on April 10, 2002. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002). Franklin filed this federal petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Fort Worth Division, on September 9, 2003.[1]

D. Issues

By way of the instant petition, Franklin raises six grounds for relief:

(1) His restraint is illegal because the Texas Court of Criminal Appeals opinion in *Ex parte Franklin*, 72 S.W.3d 671 (Tex. Crim. App. 2002), was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court;

(2) His restraint is illegal because the Texas Court of Criminal Appeals opinion in *Ex parte Franklin* was based on an unreasonable determination of

[1] A prisoner represented by counsel in a habeas corpus proceeding is not entitled to the benefit of the "mailbox rule." *Cousin v. Lensing*, 310 F.3d 843, 847-49 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 2277 (2003).

the facts in light of the evidence presented at the state trial court proceedings;

(3) His restraint is illegal because the appellate opinion in *Franklin v. Texas* No. 2-95-084-CR (Tex. App. – Fort Worth Oct. 18, 1996, pet. ref'd) (not designated for publication), regarding the trial court's denial of a mistrial following improper prosecutorial vouching was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court;

(4) His restraint is illegal because he is actually innocent, which violates the United States Constitution;

(5) His restraint is illegal because the complainant perjured herself at trial, which violated the due process clause of the Fifth and Fourteenth Amendments of the Unites [sic] States Constitution; and

(6) His restraint is illegal because he was convicted based on the complainant's perjury and evidence admitted because of this perjury, which violated the right to a fair trial clause under the Fifth and Fourteenth Amendments to the United States Constitution. (Second Amended Petition at 2-3.)

E. Rule 5 Statement

Dretke believes that Franklin has not sufficiently exhausted his state remedies as required by 28 U.S.C. § 2254(b) and (c) with regard to issues five and six listed above. (Resp't Answer at 7.) As a preliminary matter, however, the court considers Dretke's argument that the petition is time barred. (*Id.* at 8.)

F. Statute of Limitations

The Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), effective April 24, 1996, imposes a one-year statute of limitations for filing a petition for federal habeas corpus relief. 28 U.S.C. § 2244(d). Section 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

Because the foundation of Franklin's claims is B.R.'s affidavit, which was discovered after his conviction became final, subsection (d)(1)(D) is applicable to the computation of the limitations period in this case – i.e., the date on which the factual predicate of his claims could have been discovered through the exercise of due diligence. Under this provision, the statute of limitations began on May 15, 1999, when Franklin's counsel was notified of and received a copy of B.R.'s affidavit, and expired one year later on May 15, 2000, absent any applicable tolling.[2, 3] Franklin's

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[2] Franklin argues that the limitations period should not begin until March 2003, at which time he obtained the affidavit of one of the jurors in the case, thus culminating an exhaustive legal and factual investigation into the case necessary to "lay the proper groundwork for the State and federal writs." The thrust of this federal petition is Franklin's assertion that he is actually innocent of the crime for which he was convicted. In support of his petition, he relies heavily on B.R.'s affidavit reflecting that she was not truthful at trial about her sexual history. As indicated above, Franklin was aware or should have been aware of the affidavit in question on, or shortly after, May 15, 1999, when the prosecutor provided a copy of the document to Franklin's counsel. The time is [sic] took Franklin to gather additional evidence in support of his petition is irrelevant to the commencement of the limitations period. *See Flanagan v. Johnson*, 154 F.3d 196, 198-99 (5th Cir. 1998).

[3] Franklin's state habeas application filed after limitations had already expired did not operate to toll the limitations period under § 2244(d)(2). *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Nor has Franklin demonstrated that he is entitled to equitable tolling, which is available only in rare and exceptional circumstances when an

(Continued on following page)

petition, filed on September 9, 2003, is therefore untimely. 28 U.S.C. § 2244(d).

II. RECOMMENDATION

Franklin's petition for writ of habeas corpus should be dismissed with prejudice as time-barred.

III. NOTICE OF RIGHT TO OBJECT TO PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATION AND CONSEQUENCES OF FAILURE TO OBJECT

Under 28 U.S.C. § 636(b)(1), each party to this action has the right to serve and file specific written objections in the United States District Court to the United States Magistrate Judge's proposed findings, conclusions, and recommendation within ten (10) days after the party has been served with a copy of this document. The court is extending the deadline within which to file specific written objections to the United States Magistrate

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extraordinary factor beyond the petitioner's control prevents him from filing in a timely manner. *See Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). A claim of actual innocence is not a "rare and exceptional circumstance" justifying application of the equitable tolling doctrine. *See Cousin*, 310 F.3d at 849; *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). Franklin distinguishes between an "unsupported claim of actual innocence" and a "colorable claim of innocence" in an effort to persuade the court to apply equitable tolling to his case. (Second Amended Petition at 21-22; Pet'r Reply at 4-5.) *See Felder*, 204 F.3d at 171 n.8 (noting that petitioner, although alleging actual innocence, had not made a "showing" of actual innocence); *Alexander v. Johnson*, 217 F. Supp. 2d 780, 791-92 (S.D. Tex. 2001) (holding limitations equitably tolled because petitioner made a showing of actual innocence). No Fifth Circuit case law has been found, however, expressly requiring the court to make such a distinction.

Judge's proposed findings, conclusions, and recommendation until May 13, 2004. The United States District Judge need only make a *de novo* determination of those portions of the United States Magistrate Judge's proposed findings, conclusions, and recommendation to which specific objection is timely made. *See* 28 U.S.C. § 636(B)(1). Failure to file by the date stated above a specific written objection to a proposed factual finding or legal conclusion will bar a party, except upon grounds of plain error or manifest injustice, from attacking on appeal any such proposed factual finding or legal conclusion accepted by the United States District Judge. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc op. on reh'g); *Carter v. Collins*, 918 F.2d 1198, 1203 (5th Cir. 1990).

IV. ORDER

Under 28 U.S.C. § 636, it is ORDERED that each party is granted until May 13, 2004, to serve and file written objections to the United States Magistrate Judge's proposed findings, conclusions, and recommendation. It is further ORDERED that if objections are filed and the opposing party chooses to file a response, a response shall be filed within seven (7) days of the filing date of the objections.

It is further ORDERED that the above-styled and numbered action, previously referred to the United States Magistrate Judge for findings, conclusions, and recommendation, be and hereby is returned to the docket of the United States District Judge.

SIGNED this 22 day of April, 2004.

/s/ Charles Bleil
CHARLES BLEIL
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

72 S.W.3d 671 (Tex.Crim.App. 2002)

Ex Parte Brian Edward FRANKLIN, Applicant.

No. 74041.

Court of Criminal Appeals of Texas, En Banc.

April 10, 2002.

Neal Davis, Dick Deguerin, Houston, for Appellant.

Charles M. Mallin, Asst. DA, Fort Worth, for State.

Before the court en banc.

OPINION

MEYERS, J., delivered the opinion of the Court in which KELLER, P.J., PRICE, KEASLER, HERVEY, HOLCOMB, and COCHRAN, J.J. joined.

This is a post-conviction application for a writ of habeas corpus forwarded to this Court pursuant to Article 11.07, V.A.C.C.P. In 1995 applicant was convicted by a jury of aggravated sexual assault of a child under fourteen years of age. TEX. PENAL CODE § 22.021(a)(1)(B)(i), (a)(1)(B)(iii), and (a)(2)(B). His punishment was assessed at life imprisonment. The Second Court of Appeals affirmed. *Franklin v. State*, No. 2-95-084-CR (Tex.App.-Fort Worth Oct. 18, 1996, pet. ref'd) (not designated for publication).

In 1999 applicant filed a post-conviction application for a writ of habeas corpus claiming that newly discovered evidence shows him to be actually innocent of the crime for which he was convicted. The trial court conducted a

hearing in which it heard testimony regarding the new evidence presented by applicant. When the transcript of applicant's initial hearing arrived, we determined that while the trial court's findings were based upon the correct level of confidence, *clear and convincing,* the standard to which this level applied was not correctly evaluated. The habeas judge's conclusion was stated as follows:

> [Applicant] has shown, through clear and convincing evidence, that [the newly discovered evidence], superimposed over the weak inculpatory evidence at his trial, *create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial.*

District Court's Findings of Fact, Conclusions of Law, and Order of the Court, Conclusions of Law 15 (emphasis added). Instead, we stated, that the proper test is whether applicant has shown "by clear and convincing evidence that *no reasonable juror would have convicted him in light of the new evidence.*" *Ex parte Elizondo,* 947 S.W.2d 202, 209 (Tex.Crim.App.1996) (emphasis added). Accordingly, in an unpublished per curiam opinion on September 12, 2001, we held this writ application in abeyance and ordered the trial court to reconsider applicant's claim in light of the proper test. We also ordered a supplemental transcript containing any affidavits, the transcription of the court reporter's notes from any interrogatories or hearings held, along with the trial court's revised findings of fact and conclusions of law. The transcript directed in the order is before us, together with the trial court's findings of fact and conclusions of law, and we can now proceed to decide the issue with finality.

I.

On April 13, 1994, B.R., the complainant, made a report to a teacher at school that she had been raped by applicant. The teacher called Child Protective Services. Applicant was subsequently charged and indicted for aggravated sexual assault of a child.

The trial commenced in February of 1995. At trial B.R. testified that one evening in March of 1994,[1] applicant raped her in the backyard of her father's house.[2] At the time, B.R. was thirteen years old. Applicant was a friend of the family and often visited B.R.'s father. B.R. testified that her father and his girlfriend were inside the house during the rape. She did not tell her father and his girlfriend about the experience after she returned to the house. Applicant testified that prior to the time of the sexual assault, she had never had sexual relations with anyone.

B.R.'s mother, G.G., was also called as a state's witness. She testified that the following day after B.R. returned from visiting her father during spring break in March, she found a pair of blood-stained underwear in the laundry that B.R. brought home. She stated that B.R. had her period two weeks prior to the day that she found the stained underwear. She noticed that the stain was a brighter red than that of the color of menstrual blood. The underwear, however, was not produced at trial because

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[1] The exact date of the alleged offense was never determined at trial.

[2] B.R.'s parents were divorced. Although she lived with her mother, her father was given court-ordered visitation rights.

G.G. had bleached them and could no longer differentiate that pair from other pairs of B.R.'s underwear.

Dr. Jan Lamb, the doctor who examined B.R. on April 20, 1994, following her outcry, testified that B.R. told her that she had been raped by applicant in March of 1994. In addition, she stated that the examination indicated that there was a rupture in a certain area of the hymen indicative of blunt force trauma and that the injury observed on B.R. would be consistent with her bleeding at the time of the offense. Such blood, she stated, would have been bright red in color from rupturing capillaries as opposed to the darker color of menstrual blood. On cross-examination Lamb admitted that blunt force trauma is not in itself an indication that someone has been raped and that you could find the same thing after a person has engaged in sexual intercourse for the first time. Since the exam was removed from the exact time of the assault, no forensic evidence was collected.

Constance Patton, a forensic serologist with the Tarrant County Medical Examiner's Office was called as a defense witness. She testified that blood on clothing gets darker in color the older the stain is and that if a stain is bright red, it is an indicator that the blood has not been present for a very long period of time. She explained that within six to eight hours, a blood stain on clothing is going to start to turn dark red to a brownish color.

Applicant did not testify at the trial. The jury found applicant guilty of aggravated sexual assault of a child and assessed punishment at life imprisonment.

In May of 1998 the Tarrant County District Attorney's Office notified applicant's trial counsel that it had received an affidavit from the police in which B.R. stated that she

had been sexually assaulted by her step-father from the time when she was six years old until the time that her mother moved her away from her step-father.[3] After receiving this information, applicant filed the present application for a post-conviction writ of habeas corpus based on newly discovered evidence.

The district court conducted a habeas hearing in which several witnesses were called to testify. Applicant first called Rose Salinas, the lead prosecutor in applicant's trial, to testify.[4] She stated that at the time she prosecuted applicant, she felt that B.R. was a credible witness. But if she had found out B.R. had lied to her during the trial, she testified that her opinion as to B.R.'s credibility would have changed. Moreover, she never would have been able to offer the medical evidence that was introduced at trial against applicant. On cross-examination she testified that the fact that there was another perpetrator would have not prevented her from trying the case and that she would have still prosecuted the case without the medical testimony. When asked by the trial court judge whether she would have moved to dismiss the case once she found out B.R. had lied to her she stated, "[H]ad we been in trial and this child had committed perjury and I found out about it after the fact, what I am saying is I might have moved to dismiss the case. And I'm very serious about the fact that that's a very strong possibility that it would have happened."

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[3] The period of abuse, which started before applicant assaulted B.R. and continued afterwards, lasted for approximately ten years.

[4] At the time of the habeas hearing, Salinas was no longer with the Tarrant County District Attorney's office but was working as an attorney in private practice.

Applicant also called Dr. Jan Lamb as its witness. She testified that if she had known that B.R. was also sexually assaulted by her step-father, she would not have been able to testify at trial as to which incident caused B.R. to have had blunt force trauma to her hymen. On cross-examination when asked if the knowledge that B.R. did not disclose the abuse by her step-father changed her opinion of B.R.'s credibility she stated "no." She explained that it is not unusual for children who are victims of sexual abuse not to discuss their sexual abuse. In addition, she also explained that children who have been sexually victimized are much more easily re-victimized due to the fact that they have very poor emotional, psychological and physical boundaries.

Applicant was also called as a witness. He produced various receipts and a phone bill in order to provide an alibi for the time period during which it was believed that the offense occurred. Although available at the time, none of these documents were introduced at applicant's trial.

B.R. was called by the State to testify. She stated that aside from the statement that she had never engaged in sexual intercourse before, everything else to which she testified during applicant's trial was true. She testified that the reason that she did not tell anyone about the sexual abuse she suffered by her step-father, J.G., was that she was afraid of him. She explained that she was unable to tell Ms. Salinas, Dr. Lamb, or counselors that she was being abused by J.G. due to the fact that he would almost always accompany her to the meetings. He was even in the room the day on which Dr. Lamb conducted the sexual assault examination. Moreover, she testified that during the couple of times that J.G. did not accompany her to the appointments, he would insist that she tell him

what had happened during the meetings. He was angry when he found out that B.R. had reported the sexual assault by applicant because he was afraid that people would find out about his own actions. On cross-examination, B.R. stated that contact with J.G. had also caused her to bleed on a few occasions, but not as much as she bled following the assault by applicant.

Initially the habeas judge concluded that applicant "has shown, through clear and convincing evidence, that [the newly discovered evidence] superimposed over the weak inculpatory evidence at his trial, create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial." District Court's Findings of Fact, Conclusions of Law, and Order of the Court, Conclusions of Law 15. We ordered the trial court to reconsider applicant's claim in light of the test expounded in *Elizondo*. In its supplemental order the trial court concluded that "Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence." District Court's Supplemental and Revised Conclusions of Law and Order of the Court, Conclusions of Law 6.[5]

II.

In *State ex. rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 397 (Tex.Crim.App.1994), we accepted the

[5] Although this Court is not bound by the findings of the trial court in post-conviction habeas corpus proceedings, such findings are considered if supported by the record. *Ex parte Morrow*, 952 S.W.2d 530, 534 (Tex.Crim.App.1997). We find in the present case that although the trial court properly applied the narrow holding of *Elizondo*, it failed to take into account its greater purpose.

proposition that the execution of an innocent person would constitute a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Accordingly, we held that a post-conviction application for a writ of habeas corpus was an appropriate vehicle for a convicted defendant sentenced to death to assert a claim of actual innocence. *Id.* at 398. Approximately two years later in *Elizondo* we were presented with the issue of whether a claim of actual innocence was cognizable by this Court in a post-conviction habeas corpus proceeding when the punishment assessed is not death but confinement. *Elizondo*, 947 S.W.2d at 204. We concluded that the basis for entertaining a post-conviction application for a writ of habeas corpus claim of actual innocence is not peculiar to capital cases in that the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of an innocent person; thereby making claims of actual innocence cognizable by this Court in post-conviction habeas corpus proceedings whether the punishment assessed is death or confinement. *Id.* at 205.

Claims of actual innocence are categorized either as *Herrera*-type claims or *Schlup*-type claims. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Elizondo*, 947 S.W.2d at 208. A *Herrera*-type claim involves a substantive claim in which applicant asserts his bare claim of innocence based solely on newly discovered evidence. *Schlup*, 513 U.S. at 314, 115 S.Ct. 851; *See also Elizondo*, 947 S.W.2d at 208. A *Schlup*-type claim, on the other hand, is a procedural claim in which applicant's claim of innocence does not provide a

basis for relief, but is tied to a showing of constitutional error at trial. *Schlup*, 513 U.S. at 314, 115 S.Ct. 851.[6] The two claims require applicants to meet different burdens in order to obtain habeas relief.

In *Schlup*, the petitioner asserted a claim of actual innocence by claiming that constitutional error deprived the jury of critical evidence that would have established his innocence. *Id.* at 301, 115 S.Ct. 851. Before addressing the merits of Schlup's claim, the Supreme Court discussed the importance of distinguishing between the type of claim asserted by Schlup versus the type of claim asserted by the petitioner in *Herrera*. In *Herrera*, the petitioner based his claim of actual innocence on newly discovered evidence that showed that his brother committed the crime for which he was convicted. *Herrera*, 506 U.S. at 396, 113 S.Ct. 853. The Court expounded upon the difference between the two situations:

> Schlup's claim thus differs in at least two important ways from that presented in *Herrera*. First, Schlup's claim of innocence does not by itself provide a basis for relief. Instead, his claim for relief depends critically on the validity of his *Strickland* and *Brady* claims. Schlup's claim of innocence is thus "not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."

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[6] *See generally* Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L.REV. 142 (1970) (arguing that "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a cognizable claim of innocence").

> More importantly, a court's assumptions about the validity of the proceedings that resulted in a conviction are fundamentally different in Schlup's case than in Herrera's. In *Herrera,* petitioner's claim was evaluated on the assumption that the trial that resulted in his conviction had been error free. In such a case, when a petitioner has been "tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants," it is appropriate to apply an "'extraordinarily high'" standard of review.
>
> * * *
>
> Consequently, Schlup's evidence of innocence need carry less of a burden. In Herrera (on the assumption that petitioner's claim was, in principle, legally well founded), the evidence of innocence would have had to be strong enough to make his execution "constitutionally intolerable" *even if* his conviction was the product of a fair trial. For Schlup, the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice *unless* his conviction was a product of a fair trial.

Schlup, 513 U.S. at 315-16, 115 S.Ct. 851 (citations omitted). The Court concluded that in a *Schlup*-type situation, the petitioner must show that the constitutional error "probably resulted" in the conviction of one who was actually innocent. *Id.* at 326-27, 115 S.Ct. 851. The Court articulated the meaning of probably resulted as follows: "The petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327, 115 S.Ct. 851; *see also Elizondo*, 947 *S.* W.2d at 209. For a *Herrera*-type claim,

however, the bare claim of innocence would fail unless the court was convinced that the new facts "unquestionably establish" applicant's innocence. *Schlup*, 513 U.S. at 317, 115 S.Ct. 851. The Court failed to elaborate, however, as to the level of confidence invoked by the use of the phrase "unquestionably establish."

In *Elizondo* applicant presented this Court with a *Herrera*-type claim. Applicant raised a claim of actual innocence based upon the recantation of testimony given by one of the victims of a crime for which applicant was convicted. We determined that the standard set by this Court in *Holmes*, which was decided prior to *Schlup*, made it "theoretically impossible" for any habeas applicant to gain relief. *Elizondo*, 947 S.W.2d at 205. In *Holmes* we held that "in order to be entitled to relief on a claim of factual innocence the applicant must show that based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." 885 S.W.2d at 398. As such, we turned to *Schlup* for guidance and modified the standard to be applied in *Herrera*-type claims. We determined the "unquestionably establish" language as meaning the same thing as "clear and convincing." *Elizondo*, 947 S.W.2d at 209.

III.

In the present case, applicant does not raise any procedural claims attacking the constitutionality of his trial proceedings. Instead, he asserts a *Herrera*-type claim in which he argues that newly discovered evidence, B.R.'s admission that she was sexually assaulted by her

step-father, entitles him to habeas relief. Applicant cites to the test set forth in *Elizondo*.

In *Elizondo* we held that an applicant asserting a *Herrera*-type claim must show *by clear and convincing evidence* that no reasonable juror would have convicted him in light of the newly discovered evidence. *Id.* Today we take this opportunity to explain the type of evidence that is required by this Court in order to succeed on a *Herrera*-type claim. Although not explicitly stated in the holding, it is clear that *Elizondo* requires that applicants presenting *Herrera*-type claims offer evidence that goes towards affirmatively proving applicant's innocence. In *Elizondo* we explained:

> Because, in evaluating a habeas claim that newly discovered evidence or available evidence proves the applicant to be innocent of the crime for which he was convicted, our task is to assess the probable impact of the newly available evidence upon the persuasiveness of the State's case as a whole, we must necessarily weigh such *exculpatory* evidence against the evidence of guilt adduced at trial.

Id. at 206 (emphasis added). In addition, when discussing a suitable standard for describing applicant's burden of proof in a collateral proceeding where he does not attack the rationality of a factfinder's verdict, we cited to the formulation described by Justice Blackmun in his dissent in *Herrera* where he explained that applicants must produce evidence that proves their innocence and not merely raises doubt about their guilt:

> The government bears the burden of proving the defendant's guilt beyond a reasonable doubt, but once the government has done so, the burden of

> proving innocence must shift to the convicted defendant. The actual-innocence inquiry is therefore distinguishable from review for sufficiency of the evidence, where the question is not whether the defendant is actually innocent but whether the government has met its constitutional burden of proving the defendant's guilt beyond a reasonable doubt. When a defendant seeks to challenge the determination after he has been validly convicted and sentenced, it is fair to place on him the burden of proving his innocence not just raising doubt about his guilt.

506 U.S. at 443, 113 S.Ct. 853 (Blackmun, J., dissenting) (citations omitted). Finally, when discussing the grounds on which we afforded applicant relief in *Elizondo*, we explained, "Robert's recantation not only voids his trial testimony which implicated applicant, but constitutes *affirmative evidence* of applicant's innocence. We are convinced by clear and convincing evidence that no rational jury would convict him in light of the new evidence." *Elizondo*, 947 S.W.2d at 210 (emphasis added). It is apparent that our holding in *Elizondo* was meant to act as a mechanism for freeing the innocent, not as a vehicle for out-of-time motions for new trial.

A conviction that results from a constitutionally error-free trial is entitled to the greatest respect. *Id.* at 209. Accordingly, we hold that when an applicant asserts a *Herrera*-type claim based on newly discovered evidence, the evidence presented must constitute affirmative evidence of the applicant's innocence.[7] Once the applicant

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[7] In addition to trustworthy witness recantations, other examples of such evidence may include exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence. *See Schlup*, 513 U.S. at 324, 115 S.Ct. 851.

provides such evidence, it is then appropriate to proceed with a determination of whether the applicant can prove by clear and convincing evidence that no reasonable juror would have convicted him in light of the newly discovered evidence.

Applicant fails to present any new evidence aside from the fact that B.R. now alleges that she was also sexually assaulted by her step-father. B.R. does not recant her trial testimony. Rather she continues to allege that applicant sexually assaulted her. In her affidavit she makes this assertion on two separate occasions. She first states, "When I was 13 years old I was sexually abused by another person and when [J.G.] found out about it he was mad at me and said I must have wanted it because I didn't tell him about it. Every few months [J.G.] would get mad at me about it again." In addition she states, "I have not had sexual intercourse with anyone else but [J.G.] and the time before when I was sexually assaulted and I was 13 years old." Finally, at the habeas hearing she testified that she had been sexually assaulted by applicant.

Although applicant's evidence is important, it is limited to the impeachment of B.R.'s claim that she did not have sexual relations with other men. It certainly calls into question her veracity in general, but only collaterally affects her accusation against applicant. This evidence standing alone, however, it is not dispositive of applicant's claim of innocence.

Applicant's writ is based upon the theory espoused in *Herrera* and as such he must establish his innocence of the crime by clear and convincing evidence and not merely that he would be found not guilty by a subsequent jury. While there is no question that in an appropriate case the

principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration," *Engle v. Isaac*, 456 U.S. 107, 135, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1981), we find that applicant has not presented this Court with such a case. Applicant's claim is denied.

WOMACK, J., filed a concurring opinion.

JOHNSON, J., dissented.

WOMACK, J., filed a concurring opinion.

Today the Court again purports to rely on *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), as authority for the legitimacy of presenting a claim of newly-discovered evidence through habeas corpus. *Herrera* so clearly stands for the opposite proposition that one hardly knows whether to laugh or cry at this Court's perversion of it.

> The holdings of that case were: (1) Federal habeas corpus is not available for a claim of newly discovered evidence of innocence in the absence of a violation of constitutionally-required procedures. To require a new trial simply because a jury might acquit in light of the new evidence would not clearly produce a more reliable result, since the passage of time only diminishes the reliability of criminal adjudications. (2) Texas's 30 day limit to move for new trial on newly discovered evidence does not deny due process. (3) Executive clemency is the traditional "fail safe" remedy for late evidence of innocence. (4) Even if it were assumed for the sake of argument that a truly persuasive demonstration of actual innocence would render an execution unconstitutional so that federal habeas corpus

> would lie, Herrera's evidence fell far short of the extraordinarily high threshold showing that would be required. (Herrera's evidence was two witnesses who said that Herrera's brother, now dead, had admitted committing the crime.)

This is mighty thin sand on which to erect the holding . . . that due process (not the Cruel and Unusual Punishment Clause) would be violated by the execution of an innocent defendant, and that state habeas corpus will lie to permit a defendant to present newly discovered evidence of innocence. And it is no support at all for the holdings in this case that due process is violated by the confinement of an innocent defendant, that post-conviction habeas corpus is available to correct errors of fact, that the defendant must prove his claim by no more than clear and convincing evidence, and that the evidence of a recanting witness might be sufficient.

[Because of these holdings] a convicted defendant in every criminal case (if it is a due process problem, there is no reason to limit it to felonies or to sentences of confinement), will now be allowed and encouraged to pursue the witnesses and get them to recant. If he does so, he can relitigate his case forever. And all this is supposed to be based on *Herrera*, where the Court said that habeas corpus was not available because, "'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). To conclude otherwise would

all but paralyze our system for enforcement of the criminal law."*

As the Court takes another small step down the path of paralysis, I can only respectfully concur.

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* *Ex parte Elizondo*, 947 S.W.2d 202, 215 (Tex.Cr.App.1997) (Womack, J., dissenting to denial of rehearing)

APPENDIX F

HABEAS TRIAL COURT NO. C-2-4267-0569160-A
HABEAS COURT OF CRIMINAL APPEALS NO. 74,041

EX PARTE	§	IN CRIMINAL DISTRICT
	§	COURT
	§	NUMBER TWO OF
	§	
BRIAN EDWARD	§	TARRANT COUNTY,
FRANKLIN	§	TEXAS

THE DISTRICT COURT'S SUPPLEMENTAL AND REVISED CONCLUSIONS OF LAW AND ORDER OF THE COURT

(Filed Nov. 5, 2001)

This Court's supplemental conclusions of law and order of the court are made pursuant to the Court of Criminal Appeals' September 12, 2001, per curiam opinion in this case. Upon consideration of all the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court enters the following supplemental and revised conclusions of law and order of the [sic] of this Court:

I. CONCLUSIONS OF LAW

1. No doubt, as the Tarrant County District Attorney's office conceded at oral argument in Franklin's case before the Court of Criminal Appeals, "There were infirmities and imperfections in the trial because the child lied on the stand." This responded to Judge Sharon Keller' question about whether Applicant Franklin received a fair trial.

2. The Court of Criminal Appeals' per curiam order specifically requests that this Court expressly apply the *Elizondo* standard – whether an actual innocence applicant has shown "by *clear and convincing evidence that no reasonable juror would have convicted* him in light of the new evidence" – for showing actual innocence in a *Herrera*-type claim. ***Ex Parte Elizondo v. State***, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996) (emphasis added).

3. As the Court of Criminal Appeals sets out in its per curiam order, the *Elizondo* standard replaced the *Holmes* standard created two years earlier. ***See State ex rel. Holmes v. Court of Appeals***, 885 S.W.2d 389, 398 (Tex. Crim. App.1994). The *Holmes* standard requires an actual innocence applicant to show that "based on the newly discovered evidence and the entire record before the jury that convicted him, *no rational trier of fact could find proof of guilt beyond a reasonable doubt*" ***Id.*** (emphasis added).

4. The per curiam concurrence asks this Court to examine the "new evidence" in two ways:

(1) Examine the new evidence and consider the fact of perjury to determine what the jury would do in light of the complainant's lowered credibility, and

(2) Examine the new evidence without consideration of the fact of perjury to determine what the jury would have done if it had heard "the truth" the first time around at trial.

5. **After examining the new evidence and considering the fact of perjury to determine what the jury would do in light of the complainant's**

lowered credibility, this Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. This Court reaches this conclusion based on the following facts, which have already been set out in the original findings of fact:

Finding of Fact 3: Before Applicant Franklin's trial, the prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb spoke at length on various occasions with Brandi Rachall. **T.C.R. 70; A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.** The Court finds that Brandi Rachall lied when she failed to inform them that she had sexual relations with John Guerrero before Applicant Franklin allegedly sexually assaulted her. ***See* A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.** Rose Anna Salinas pointed out at the habeas corpus hearing that Brandi Rachall "was not at a very tender age at the time we went to trial. She was not that little. She knew the importance of what we were doing in this courtroom. Absolutely knew it. She's a very smart, intelligent girl."

H.R.R. 23. Dr. Lamb testified at the habeas corpus hearing that minors are known to make false allegations of sexual assault. ***See* H.R.R.**

Finding of Fact 5: Rose Anna Salinas is a leading legal expert in Texas on sexual assault cases involving complainants who are children. Following her graduation from law school in 1989, she prosecuted criminal cases at the Tarrant County District Attorney's Office until 1998. **A. Exhibit 2; H.R.R. 3.** She was assigned to the Crimes Against Children Unit from 1992 to 1997. **A. Exhibit 2; H.R.R. 4.** She has been a frequent lecturer at seminars dealing with child abuse. **H.R.R. 5-6.** In 1997, she was recognized as a top prosecutor in Texas in child abuse cases. **H.R.R. 7-8.**

Finding of Fact 6: The Court finds that the State's case against Applicant Franklin was "difficult," in the words of Rose Anna Salinas, because of the little evidence supporting Brandi Rachall's story. ***See*** **T.C.R. 65-68, 86-89, 105-11; A. Exhibit 7; H.R.R. 21-23.**

Finding of Fact 7: Evidence showed that no eyewitnesses saw the alleged sexual assault. **IX T.R.R. 163;** ***See*** **H.R.R.**

Finding of Fact 8: No semen, hair, epithelial cells, or other trace evidence of Applicant Franklin was ever discovered or collected. **VIII T.R.R. 53; H.R.R 21;** ***See*** **H.R.R.**

Finding of Fact 9: Matt Rachall, who is Brandi Rachall's father, and her teacher never observed any physical signs

of injury, such as scratches or abrasions, to Brandi Rachall, despite her descriptions of a violent sexual assault and bruising on her face. **T.C.R. 73; VIII T.R.R. 211-12; XIII T.R.R. Exhibit 2.**

Finding of Fact 10: Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense. **T.C.R. 69-73; VIII T.R.R. 49, 134-37; IX T.R.R. 149; X T.R.R. 56; XIII T.R.R. Exhibits 2, 7.** These inconsistencies ultimately caused the State to obtain a superseding indictment that changed the date of the alleged offense from March 5 to March 12, 1994. ***See*** **T.C.R. 3, 6; H.R.R. 43.**

Finding of Fact 11: The Court finds that, except for Brandi Rachall's testimony, no evidence at either Applicant Franklin's trial or habeas corpus hearing was introduced to show that Applicant Franklin was in Brandi Rachall's presence at Matt Rachall's house between March 11 and March 20, 1994, even though Brandi Rachall and the State contended that the sexual assault occurred at her father's house sometime during this spring break period. ***See*** **T.C.R. 3, 6;** ***See*** **T.R.R.;** ***See*** **H.R.R. 45-46, 55-56;** ***See*** **H.R.R.**

Finding of Fact 12: The Court finds that witness testimony and corroborative evidence,

namely Applicant Franklin's sales receipts and employee time sheets, established that Applicant Franklin was never present with Brandi Rachall at her father's house between March 11 and March 20, 1994. ***See*** **VIII T.R.R. 149, 189-91; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** For example, during cross-examination at Applicant Franklin's trial, Matt Rachall was asked, "During that spring break week, do you remember whether or not the Defendant visited your home with his children?", to which Matt Rachall responded, "He did not" **VIII T.R.R. 149;** ***See also*** **VIII T.R.R. 189-91.** At the habeas corpus hearing, Matt Rachall testified that, to the best of his recollection, he never saw Applicant Franklin at Matt Rachall's house from March 11 to March 20, 1994. ***See*** **H.R.R.** Matt Rachall's testimony at the trial and habeas corpus hearing was based on calendars that he had made with the assistance of prosecutors Christy Jack and Rose Anna Salinas before Applicant Franklin's trial. ***Id.***; **XIII T.R.R. Exhibit 3.** Applicant Franklin's time sheets from Central Freight Lines showed that he worked every weekday in March 1994, from approximately 6:00 p.m. to midnight. **X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9.**

Finding of Fact 13: The Court finds that evidence at the trial and habeas corpus hearing revealed that March 6, 1994, was the only date in the entire month of March that Applicant Franklin was in Brandi Rachall's presence at her father's house. **VIII T.R.R. 149; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** The State and several witnesses, including Brandi Rachall, testified that the claimed sexual assault definitely did not occur on March 6, 1994. **VIII T.R.R. 200-01; IX T.R.R. 149;** ***See*** **H.R.R.**

Finding of Fact 14: The Court finds that, because of the little evidence supporting the claimed sexual assault, the State's case against Applicant Franklin rested in large part on Brandi Rachall's testimony and credibility at trial. As prosecutor Christy Jack stated in her summation at trial, "What it boils down to is: Do you believe Brandi Rachall? When you set everything aside, do you believe Brandi Rachall?" **XI T.R.R. 11-12.** Rose Anna Salinas stated at the habeas corpus hearing that Brandi Rachall's credibility was "very important" and a "primary factor" in the jury's decision to convict Applicant Franklin. **H.R.R. 28-30.**

Finding of Fact 15: During direct examination at Applicant Franklin's trial, Brandi Rachall reiterated that she had no sexual relations before Applicant

Franklin allegedly sexually assaulted her:

Q: Had you ever had sex before?

A: No.

IX T.R.R. 161. The Court finds that Brandi Rachall lied and committed perjury at Applicant Franklin's trial when she testified that she had no sexual relations before Applicant Franklin allegedly sexually assaulted her.

Finding of Fact 16: The Court finds that the State, to support Brandi Rachall's claim that Applicant Franklin sexually assaulted her, relied on testimony regarding only two pieces of physical evidence: a pair of her blood-stained underwear and a medical examination of her hymen that was conducted several weeks after the alleged offense. **A. Exhibit 2.**

Finding of Fact 17: Gena Guerrero, who is Brandi Rachall's mother, claimed that she discovered a bloodstain on Brandi Rachall's underwear on March 21, 1994, a full day after her daughter had returned home from a trip to Waco. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero stated that, after she bleached and washed the underwear, she realized the blood could not have been from menstruation since Brandi Rachall had her period two weeks earlier. **XIII**

T.R.R. Exhibit 6; A. Exhibit 8. Gena Guerrero explained that the bloodstain on the underwear was "extremely red" and "really red," in contrast to menstruation stains, which "are a darker red almost brown." ***Id.*** Dr. Lamb testified at trial that bleeding from a sexual assault would be "bright red," not the "brownish" color of menstrual blood. **VIII T.R.R. 61.**

Finding of Fact 18: Constance Patton, an expert serologist who worked several years for the crime lab of the Forth Worth Police Department, testified at trial and the habeas corpus hearing that a "bright red" bloodstain on the underwear indicated bleeding within the previous few hours. **X T.R.R. 77;** ***See*** **H.R.R.** She further stated that a bloodstain older than twenty four hours would appear "brown." ***Id.*** Dr. Lamb testified at the habeas corpus hearing that, in her experience, the "bright red" color of fresh blood quickly turns "brown" due to oxidation. ***See*** **H.R.R.**

Finding of Fact 19: The Court finds that witness testimony and corroborative evidence at the trial and habeas corpus hearing established that Gena Guerrero discovered the "extremely red" and "really red" bloodstain on the underwear approximately two weeks after Applicant Franklin had last been in Brandi Rachall's presence at Matt Rachall's house. **VIII**

T.R.R. 149, 189-91; IX T.R.R. 16-20; X T.R.R. 88; XIII T.R.R. Exhibits 3, 6, 9; A. Exhibits 8, 9; *See* H.R.R.

Finding of Fact 20: Because of her "delayed outcry," Brandi Rachall did not undergo a medical examination until several weeks after the alleged sexual assault. **T.C.R. 72-73; XIII T.R.R. Exhibit 2; A. Exhibit 3; H.R.R. 18, 45-46; *See* H.R.R.** Dr. Lamb, who performed the medical examination, focused on any damage to Brandi Rachall's hymen. **VIII T.R.R. 51-62; A. Exhibit 3; *See* H.R.R.** An "interruption of the [hymen] tissue at 11:00 and down between 5:00 and 6:00 o'clock" caused Dr. Lamb to testify that Brandi Rachall's hymen had been penetrated. ***Id.*** Operating under the assumption that Brandi Rachall had no sexual relations before the claimed sexual assault, Dr. Lamb wrote in her medical report and testified at trial that the hymen damage was consistent with Brandi Rachall's claim that Applicant Franklin had sexually assaulted her. ***Id.***

Finding of Fact 21: The Court finds that the trial record and Rose Anna Salinas' testimony at the habeas corpus hearing unquestionably showed that the State's trial preparation, theory, and presentation were all based on Brandi Rachall's repeated

assertions that she had no sexual relations before the alleged sexual assault. Rose Anna Salinas specifically testified that Brandi Rachall's supposed virginity before the alleged offense was "one of the most crucial factors" at Applicant Franklin's trial. **H.R.R. 28.** Rose Anna Salinas further stated that, if she had known that Brandi Rachall engaged in sexual relations before Applicant Franklin allegedly committed the offense, "every evaluation . . . made during the trial, during the preparation for the trial would have changed." **H.R.R. 42.**

Finding of Fact 22: The Court finds that the State introduced evidence to the jury at Applicant Franklin's trial about Brandi Rachall's hymen damage to show or at least suggest that it was the sole result of Applicant Franklin sexually assaulting her. **VIII T.R.R. 51-62; XII T.R.R. 165-66; A. Exhibits 2, 3; *See* H.R.R.** At the habeas corpus hearing, Rose Anna Salinas testified that she "presented the case to the jury . . . with the theory that changes in the hymen of Brandi Rachall were due to the assault or claimed assault by Brian Franklin" and "that was the theory of the . . . Prosecution all the way through." **H.R.R. 14.**

Finding of Fact 23: The Court finds that the State introduced evidence to the jury about Brandi Rachall's lack of

prior relationship with any males to show or at least suggest that she was a virgin before Applicant Franklin allegedly sexually assaulted her. **IX T.R.R. 135-37; XI T.R.R: 13-15.** Rose Anna Salinas testified that "the questions . . . asked about whether Brandi had had any other boyfriends was another way of asking and obtaining her answer that she had not had sex before . . . I wanted to establish she was very sexually naive and had no other experiences other than this sexual abuse by Brian Franklin." **H.R.R.**

Finding of Fact 24: The Court finds that the State introduced evidence to the jury about Brandi Rachall's blood-stained underwear to show or at least suggest that it was the sole result of Applicant Franklin allegedly penetrating and breaking her hymen. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibits 2, 8; H.R.R. 50-51;** ***See*** **H.R.R.**

Finding of Fact 25: The Court finds that the State introduced evidence to the jury about Brandi Rachall having nightmares to show or at least suggest that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 28-29, 197; XI T.R.R. 17, 41;** ***See*** **H.R.R.**

Finding of Fact 26: The Court finds that the State introduced evidence to the jury

about Brandi Rachall having migraines to show or at least suggest to the jury that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 29-30; *See* H.R.R.**

Finding of Fact 27: The Court finds that the State introduced evidence to the jury about Brandi Rachall no longer wearing clothes that "[camel above her ankle" to show or at least suggest that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27-28. *See* H.R.R.**

Finding of Fact 28: The Court finds that the State introduced evidence to the jury about Brandi Rachall going to counseling to show or at least suggest to that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27, 197; H.R.R. 14-16; *See* H.R.R.**

Finding of Fact 29: On February 24, 1995, the jury found Applicant Franklin guilty and sentenced him to life imprisonment. **T.C.R. 224; XI T.R.R. 46; XII T.R.R. 177.**

Finding of Fact 31: On May 15, 1998, prosecutor Christy Jack sent defendant's trial counsel Leonard Schilling a letter stating, "Please find enclosed information that was brought to our attention on May 13, 1998, which may or may not concern the Brian

Franklin case." **A. Exhibits 5, 10, 11.**

Finding of Fact 32: Sent with prosecutor Christy Jack's letter were various affidavits, police investigation notes, and other information relating to new claims that Brandi Rachall had recently made about having sexual relations with John Guerrero, who was her stepfather at the time. ***See id.***

Finding of Fact 33: In an affidavit dated May 5, 1998, Brandi Rachall stated that she had daily sexual relations with her stepfather for over eleven years. **A. Exhibit 6.**

Finding of Fact 34: This eleven-year period of daily sexual relations covered the time before, during, and after the alleged sexual assault that Brandi Rachall claimed Applicant Franklin committed on her. ***Id.***

Finding of Fact 35: The Court finds that Brandi Rachall's May 1998 affidavit to police directly contradicted her own testimony, as well as the testimony of other witnesses, adduced before and during Applicant Franklin's trial. ***Id.***, ***See*** **T.C.R.**, ***See*** **T.R.R., A. Exhibits 2, 3, 10, 11;** ***See*** **H.R.R.**

Finding of Fact 36: The Court finds that the diligent pre-trial and trial investigations of Applicant Franklin's counsel did not and could not have uncovered this new evidence regarding Brandi

Rachall's sexual relations with John Guerrero. ***See*** **A. Exhibits 10, 11.**

Finding of Fact 37: The Court finds that whether a complainant in a sexual assault case has a single perpetrator or multiple perpetrators will determine what evidence the State will introduce at trial. Rose Anna Salinas testified at the habeas corpus hearing that it is "important to know the sexual history, if there is one, of a child who is the complaining witness in a case of sexual assault . . . One of the reasons you need to know that is because like this particular case . . . you may not be able to bring that medical evidence to a jury . . . Another reason is if you have psychological type of trauma that is evidence . . . you may be limited." **H.R.R. 9-10.**

Finding of Fact 38: The Court finds that, in light of the new evidence, testimony about the damage to Brandi Rachall's hymen would not have been introduced at Applicant Franklin's trial. Rose Anna Salinas testified, "I certainly would have never been able to offer the medical evidence that I offered against Brian Franklin. I would have never been able to offer that against him. I wouldn't have presented it. I couldn't. I could not say that the injury was caused by him . . . I can tell you right now that that medical evidence would not have been offered against him."

H.R.R 24-25, 27; A. Exhibits 2, 3, 10, 11; *See* H.R.R.

Finding of Fact 39: The Court finds that, in light of new evidence, testimony about Brandi Rachall's bloodstained panties would not have been introduced at the trial. Rose Anna Salinas testified that it was "very likely that the testimony [about the bloodstained underwear] ... would not have been admissible." **H.R.R. 51; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

Finding of Fact 40: The Court finds that, in light of the new evidence, Brandi Rachall almost surely would have never testified at trial. Rose Anna Salinas testified, "To me [Brandi Rachall] was very credible ... [I] believed her ... Otherwise, I would have never gone into court with this case," "I just know that I no longer find her credible," and "her credibility as presented to this jury [at Applicant Franklin's trial] was deeply and adversely affected." **H.R.R. 23, 49, 61.**

Finding of Fact 41: The Court finds that, in light of the new evidence, the State would have dismissed the case against Applicant Franklin or at the very least requested a mistrial at Applicant Franklin's trial. Rose Anna Salinas stated in her affidavit, "Had I known that ... Brandi Rachall intentionally withheld evidence of her previous sexual contact with John

Guerrero, I would have had such serious doubts about Applicant Franklin's guilt that I would have immediately dismissed the charges against him." **A. Exhibit 2.** At the habeas corpus hearing, Rose Anna Salinas testified, "I thought I could evaluate [Applicant Franklin's] case properly to prosecute it and obviously I was wrong. [Brandi Rachall] fooled me" and that "I might have moved to dismiss this case. And that's a very strong possibility that would have happened . . . [At] the very least [I] would have joined the defense in a motion for mistrial." **H.R.R. 54, 63.**

Finding of Fact 42: The Court finds that . . . Rose Anna Salinas testified at several points during the habeas corpus hearing that Brandi Rachall's lies concerning her sexual history "permeated the case" and "adversely affected . . . the integrity of the jury's verdict." **H.R.R. 30, 48.** At the end of her testimony, Rose Anna Salinas stated, "My opinion is that I don't believe [Applicant Franklin] got a fair trial" and "the bottom line is this jury verdict cannot be trusted because of the false information." **H.R.R. 62, 67.**

6. **After examining the new evidence without considering the fact of the complainant's perjury to determine what the jury would have done if it had heard "the truth" the first time around at trial, this**

Court concludes that Applicant Franklin has shown by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence. This Court reaches this conclusion based on the following facts, which have also been set out in the original findings of fact and which have been cited above under conclusion of law "5.":

Finding of Fact 3: Before Applicant Franklin's trial, the prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb spoke at length on various occasions with Brandi Rachall. **T.C.R. 70; A. Exhibits 2, 3,10,11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.**

Finding of Fact 5: Rose Anna Salinas is a leading legal expert in Texas on sexual assault cases involving complainants who are children. Following her graduation from law school in 1989, she prosecuted criminal cases at the Tarrant County District Attorney's Office until 1998. **A. Exhibit 2; H.R.R. 3.** She was assigned to the Crimes Against Children Unit from 1992 to 1997. **A. Exhibit 2; H.R.R. 4.** She has been a frequent lecturer at seminars dealing with child abuse. **H.R.R. 5-6.** in 1997, she was recognized as a top prosecutor in Texas in child abuse cases. **H.R.R. 7-8.**

Finding of Fact 6: The Court finds that the State's case against Applicant Franklin

was "difficult," in the words of Rose Anna Salinas, because of the little evidence supporting Brandi Rachall's story. ***See*** **T.C.R. 65-68, 86-89, 105-11; A. Exhibit 7; H.R.R. 21-23.**

Finding of Fact 7: Evidence showed that no eyewitnesses saw the alleged sexual assault. **IX T.R.R. 163;** ***See*** **H.R.R.**

Finding of Fact 8: No semen, hair, epithelial cells, or other trace evidence of Applicant Franklin was ever discovered or collected. **VIII T.R.R. 53; H.R.R 21;** ***See*** **H.R.R.**

Finding of Fact 9: Matt Rachall, who is Brandi Rachall's father, and her teacher never observed any physical signs of injury, such as scratches or abrasions, to Brandi Rachall, despite her descriptions of a violent sexual assault and bruising on her face. **T.C.R. 73; VIII T.R.R. 211-12; XIII T.R.R. Exhibit 2.**

Finding of Fact 10: Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense. **T.C.R. 69-73; VIII T.R.R. 49, 134-37; IX T.R.R. 149; X T.R.R. 56; XIII T.R.R. Exhibits 2, 7.** These inconsistencies ultimately caused the State to obtain a superseding indictment that changed the date of the alleged offense from March 5 to March 12, 1994. ***See*** **T.C.R. 3, 6; H.R.R. 43.**

Finding of Fact 11: The Court finds that, except for Brandi Rachall's testimony, no evidence at either Applicant Franklin's trial or habeas corpus hearing was introduced to show that Applicant Franklin was in Brandi Rachall's presence at Matt Rachall's house between March 11 and March 20, 1994, even though Brandi Rachall and the State contended that the sexual assault occurred at her father's house sometime during this spring break period. ***See*** **T.C.R. 3, 6;** ***See*** **T.R.R.;** ***See*** **H.R.R. 45-46, 55-56;** ***See*** **H.R.R.**

Finding of Fact 12: The Court finds that witness testimony and corroborative evidence, namely Applicant Franklin's sales receipts and employee time sheets, established that Applicant Franklin was never present with Brandi Rachall at her father's house between March 11 and March 20, 1994. ***See*** **VIII T.R.R. 149, 189-91; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** For example, during cross-examination at Applicant Franklin's trial, Matt Rachall was asked, "During that spring break week, do you remember whether or not the Defendant visited your home with his children?", to which Matt Rachall responded, "He did not." **VIII T.R.R. 149;** ***See also*** **VIII T.R.R. 189-91.** At the habeas corpus hearing, Matt Rachall testified that,

to the best of his recollection, he never saw Applicant Franklin at Matt Rachall's house from March 11 to March 20, 1994. ***See*** **H.R.R.** Matt Rachall's testimony at the trial and habeas corpus hearing was based on calendars that he had made with the assistance of prosecutors Christy Jack and Rose Anna Salinas before Applicant Franklin's trial. *Id.*; **XIII T.R.R. Exhibit 3.** Applicant Franklin's time sheets from Central Freight Lines showed that he worked every weekday in March 1994, from approximately 6:00 p.m. to midnight. **X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9.**

Finding of Fact 13: The Court finds that evidence at the trial and habeas corpus hearing revealed that March 6, 1994, was the only date in the entire month of March that Applicant Franklin was in Brandi Rachall's presence at her father's house. **VIII T.R.R. 149; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** The State and several witnesses including Brandi Rachall, testified that the claimed sexual assault definitely did not occur on March 6, 1994. **VIII T.R.R. 200-01; IX T.R.R. 149;** ***See*** **H.R.R.**

Finding of Fact 16: The Court finds that the State, to support Brandi Rachall's claim that Applicant Franklin sexually assaulted her, relied on testimony

regarding only two pieces of physical evidence: a pair of her blood-stained underwear and a medical examination of her hymen that was conducted several weeks after the alleged offense. **A. Exhibit 2.**

Finding of Fact 17: Gena Guerrero, who is Brandi Rachall's mother, claimed that she discovered a bloodstain on Brandi Rachall's underwear on March 21, 1994, a full day after her daughter had returned home from a trip to Waco. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero stated that, after she bleached and washed the underwear, she realized the blood could not have been from menstruation since Brandi Rachall had her period two weeks earlier. **XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero explained that the bloodstain on the underwear was "extremely red" and "really red," in contrast to menstruation stains, which "are a darker red almost brown." ***Id.*** Dr. Lamb testified at trial that bleeding from a sexual assault would be "bright red," not the "brownish" color of menstrual blood. **VIII T.R.R. 61.**

Finding of Fact 18: Constance Patton; an expert serologist who worked several years for the crime lab of the Forth Worth Police Department, testified at trial and the habeas corpus hearing that a "bright red" bloodstain on the

underwear indicated bleeding within the previous few hours. **X T.R.R. 77;** ***See*** **H.R.R.** She further stated that a bloodstain older than twenty four hours would appear "brown." ***Id.*** Dr. Lamb testified at the habeas corpus hearing that, in her experience, the "bright red" color of fresh blood quickly turns "brown" due to oxidation. ***See*** **H.R.R.**

Finding of Fact 19: The Court finds that witness testimony and corroborative evidence at the trial and habeas corpus hearing established that Gena Guerrero discovered the "extremely red" and "really red" bloodstain on the underwear approximately two weeks after Applicant Franklin had last been in Brandi Rachall's presence at Matt Rachall's house. **VIII T.R.R. 149, 189-91; IX T.R.R. 16-20; X T.R.R. 88; XIII T.R.R. Exhibits 3, 6, 9; A. Exhibits 8, 9;** ***See*** **H.R.R.**

Finding of Fact 20: Because of her "delayed outcry," Brandi Rachall did not undergo a medical examination until several weeks after the alleged sexual assault. **T.C.R. 72-73; XIII T.R.R. Exhibit 2; A. Exhibit 3; H.R.R. 18, 45-46;** ***See*** **H.R.R.** Dr. Lamb, who performed the medical examination, focused on any damage to Brandi Rachall's hymen. **VIII T.R.R. 51-62; A. Exhibit 3;** ***See*** **H.R.R.** An "interruption of the [hymen] tissue at 11:00 and down

between 5:00 and 6:00 o'clock" caused Dr. Lamb to testify that Brandi Rachall's hymen had been penetrated. ***Id.***

Finding of Fact 21: Rose Anna Salinas specifically testified that Brandi Rachall's supposed virginity before the alleged offense was "one of the most crucial factors" at Applicant Franklin's trial. **H.R.R. 28.** Rose Anna Salinas further stated that, if she had known that Brandi Rachall engaged in sexual relations before Applicant Franklin allegedly committed the offense, "every evaluation . . . made during the trial, during the preparation for the trial would have changed." **H.R.R. 42.**

Finding of Fact 22: The Court finds that the State introduced evidence to the jury at Applicant Franklin's trial about Brandi Rachall's hymen damage to show or at least suggest that it was the sole result of Applicant Franklin sexually assaulting her. **VIII T.R.R. 51-62; XII T.R.R. 165-66; A. Exhibits 2, 3;** ***See*** **H.R.R.** At the habeas corpus hearing, Rose Anna Salinas testified that she "presented the case to the jury . . . the theory that changes in the hymen of Brandi Rachall were due to the assault or claimed assault by Brian Franklin" and "that was the theory of the . . . Prosecution all the way through." **H.R.R. 14.**

Finding of Fact 23: The Court finds that the State introduced evidence to the jury about Brandi Rachall's lack of prior relationship with any males to show or at least suggest that she was a virgin before Applicant Franklin allegedly sexually assaulted her. **IX T.R.R. 135-37; XI T.R.R. 13-15.** Rose Anna Salinas testified that "the questions . . . asked about whether Brandi had had any other boyfriends was another way of asking and obtaining her answer that she had not had sex before . . . I wanted to establish she was very sexually naive and had no other experiences other than this sexual abuse by Brian Franklin." **H.R.R. 17.**

Finding of Fact 24: The Court finds that the State introduced evidence to the jury about Brandi Rachall's blood-stained underwear to show or at least suggest that it was the sole result of Applicant Franklin allegedly penetrating and breaking her hymen. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibits 2, 8; H.R.R. 50-51; *See* H.R.R.**

Finding of Fact 25: The Court finds that the State introduced evidence to the jury about Brandi Rachall having nightmares to show or at least suggest that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX**

T.R.R. 28-29, 197; XI T.R.R. 17, 41; *See* H.R.R.

Finding of Fact 26: The Court finds that the State introduced evidence to the jury about Brandi Rachall having migraines to show or at least suggest to the jury that they were the sole result of Applicant Franklin allegedly sexually assaulting her. IX T.R.R. 29-30; *See* H.R.R.

Finding of Fact 27: The Court finds that the State introduced evidence to the jury about Brandi Rachall no longer wearing clothes that "[came] above her ankle" to show or at least suggest that it was the sole result of Applicant Franklin allegedly sexually assaulting her. IX T.R.R. 27-28. *See* H.R.R.

Finding of Fact 28: The Court finds that the State introduced evidence to the jury about Brandi Rachall going to counseling to show or at least suggest to that it was the sole result of Applicant Franklin allegedly sexually assaulting her. IX T.R.R. 27, 197; H.R.R. 14-16; *See* H.R.R.

Finding of Fact 38: The Court finds that, in light of the new evidence, testimony about the damage to Brandi Rachall's hymen would not have been introduced at Applicant Franklin's trial. Rose Anna Salinas testified, "I certainly would have never been able to offer the medical evidence that I offered

against Brian Franklin. I would have never been able to offer that against him. I wouldn't have presented it. I couldn't. I could not say that the injury was caused by him . . . I can tell you right now that that medical evidence would not have been offered against him." **H.R.R 24-25, 27; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

Finding of Fact 39: The Court finds that, in light of new evidence, testimony about Brandi Rachall's bloodstained panties would not have been introduced at the trial. Rose Anna Salinas testified that it was "very likely that the testimony [about the bloodstained underwear] . . . would not have been admissible." **H.R.R. 51; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

7. **The Court concludes that, in light of the new evidence, Applicant Franklin is being unlawfully confined and is constitutionally entitled to a new trial under *Elizondo*.** As chief prosecutor Rose Anna Salinas eloquently stated at the end of the habeas corpus hearing, the new evidence:

> goes to something much more serious for me. And I think anybody who knows me knows that I take it very seriously when I ask a jury to send someone to prison for life. I have to be sure about my case. I always prosecuted cases that way. And to find out years later that this information has now come forward and that there is someone in prison who possibly is innocent is very, very serious to

me. So it goes beyond just being displeased with [Brandi Rachall]. I thought I could evaluate that case properly to prosecute it and obviously I was wrong.

H.R.R. 53-54.

II. ORDER OF THE COURT

Upon considering the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court finds that Applicant Franklin conviction violates the Due Process provisions of the United States and Texas Constitutions, and that he is being unlawfully confined and is constitutionally entitled to a new trial.

Pursuant to Chapter 11 of the Texas Code of Criminal Procedure, the clerk is hereby ordered to prepare a record of all papers in cause number C-2-4267-0569160-A that were filed after September 12, 2001, and transmit it to the Court of Criminal Appeals without delay and no later than November 1, 2001.

It is further ordered that copies of this order be served upon Applicant Franklin, his counsel, and counsel for the State.

Signed the 5th day of November, 2001.

/s/ Wayne Salvant
JUDGE PRESIDING

APPENDIX G

[LOGO]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 74,041

EX PARTE BRIAN EDWARD FRANKLIN, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM TARRANT COUNTY

PER CURIAM. Keller, P.J., *filed a concurring opinion, joined by Hervey and Holcomb, J.J.*. Womack, J., *filed a dissenting opinion, joined by Keasler, J.*.

ORDER

This is an application for a writ of habeas corpus which was transmitted to this Court by the clerk of the trial court pursuant to the provisions of Texas Code of Criminal Procedure Article 11.07.

Applicant was convicted by a jury of aggravated sexual assault of a child under fourteen years of age. TEX. PENAL CODE § 22.021(a)(1)(B)(i), (a)(1)(B)(iii), and (a)(2)(B). His punishment was assessed at life imprisonment. The Second Court of Appeals affirmed. *Franklin v. State*, No. 2-95-084-CR (Tex. App. – Fort Worth Oct. 18, 1996, pet. ref'd) (not designated for publication).

In his present application, applicant contends that newly discovered evidence shows him to be actually innocent of the crime for which he was convicted. Specifically, applicant alleges that the victim lied to prosecutors about her lack of sexual experience at the time of the offense. At applicant's trial, the victim testified that she had never had sex before applicant allegedly sexually assaulted her. She now says she had a sexual relationship with her stepfather for an eleven-year period of time which included the time of the alleged sexual assault by applicant.

Actual innocence claims are governed by the standards set forth in *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). In *Elizondo*, we explained that there are two types of actual innocence claims: *Schlup*-type claims and *Herrera*-type claims. These two classes of claims are derived from two Supreme Court cases. In *Schlup v. Delo*, 513 U.S. 298 (1995), the petitioner raised a claim of actual innocence which was tied to a showing of constitutional error at trial. In *Herrera v. Collins*, 506 U.S. 390 (1993), the petitioner made a claim of actual innocence while conceding that his trial had been error-free. In *Schlup*, the Supreme Court made clear that because a *Herrera*-type claim is made after the defendant has received a fair trial, "it is appropriate to apply an 'extraordinarily high' standard of review" to the petitioner's actual innocence claim. *Elizondo*, 947 S.W.2d at 208 (quoting *Schlup v. Delo*, 506 U.S. at 426). This Court agreed and held that, "in the case of a *Herrera*-type claim of actual innocence, the petitioner must show *by clear and convincing evidence* that no

reasonable juror would have convicted him in light of the new evidence." *Id.* at 209.[1]

Applicant's actual innocence claim does not include a claim that there was any error during his trial. He states in his pleadings that he "has always maintained that he [is] making a claim of 'bare innocence,' otherwise known as a *Herrera*-type claim." Therefore, applicant's actual innocence claim is subject to the "extraordinarily high standard of review" assigned to *Herrera*-type claims.

While the trial court's findings were based upon the correct level of confidence, clear and convincing, the standard to which this level applies was not correctly stated:

> [Applicant] has shown, through clear and convincing evidence, that [the newly discovered evidence], superimposed over the weak inculpatory evidence at his trial, *create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial.*

District Court's Findings of Fact, Conclusions of Law, and Order of the Court, Conclusion of Law 15 (Emphasis added). The proper test is whether applicant has shown "by clear and convincing evidence *that no reasonable juror*

[1] The *Elizondo* standard was created by this Court to replace the *Holmes* standard, which required an actual innocence applicant to show that "based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond reasonable doubt." *State ex rel. Holmes v. Court of Appeals*, 885 S.W.2d 389, 398 (Tex. Crim. App. 1994). The *Elizondo* standard does not require that the applicant show innocence beyond a reasonable doubt, but rather, that he show, by clear and convincing evidence, that a jury considering his case along with the new evidence, would not have convicted him.

would have convicted him in light of the new evidence." Elizondo, 947 S.W.2d at 209 (emphasis added). We make no judgments as to whether or not applicant in this case has, in fact, met the *Elizondo* standard. We simply direct the trial court to reconsider applicant's claim in light of the proper test.

Since this Court does not hear evidence, *Ex Parte Rodriguez,* 169 Tex.Cr.R. 367, 334 S.W.2d 294 (Tex. Crim. App. 1960), this application for a post-conviction writ of habeas corpus will be held in abeyance pending the trial court's compliance with this order. The trial court shall resolve the issues presented within 60 days of the date of this order. A supplemental transcript containing any affidavits, the transcription of the court reporter's notes from any interrogatories or hearings held, along with the trial court's revised findings of fact and conclusions of law, shall be returned to this Court within 90 days of the date of this order.

IT IS SO ORDERED THIS THE 12th DAY OF SEPTEMBER, 2001.

EN BANC
DO NOT PUBLISH

WOMACK, J., filed a dissenting opinion in which KEASLER, J., joined.

Today the Court again purports to rely on *Herrera v. Collins,* 506 U.S. 390 (1993), as authority for the legitimacy of presenting a claim of newly-discovered evidence through habeas corpus. *Herrera* so clearly stands for the

opposite proposition that one hardly knows whether to laugh or cry at this Court's perversion of it.

> The holdings of that case were: (1) Federal habeas corpus is not available for a claim of newly discovered evidence of innocence in the absence of a violation of constitutionally-required procedures. To require a new trial simply because a jury might acquit in light of the new evidence would not clearly produce a more reliable result, since the passage of time only diminishes the reliability of criminal adjudications. (2) Texas's 30-day limit to move for new trial on newly discovered evidence does not deny due process. (3) Executive clemency is the traditional "fail safe" remedy for late evidence of innocence, (4) Even if it were assumed for the sake of argument that a truly persuasive demonstration of actual innocence would render an execution unconstitutional so that federal habeas corpus would lie, Herrera's evidence fell far short of the extraordinarily high threshold showing that would be required. (Herrera's evidence was two witnesses who said that Herrera's brother, now dead, had admitted committing the crime.)
>
> This is mighty thin sand on which to erect the holding . . . that due process (not the Cruel and Unusual Punishment Clause) would be violated by the execution of an innocent defendant, and that state habeas corpus will lie to permit a defendant to present newly discovered evidence of innocence. And it is no support at all for the holdings in this case that due process is violated by the confinement of an innocent defendant, that post-conviction habeas corpus is available to correct errors of fact, that the defendant must prove his claim by no more than clear and

> convincing evidence, and that the evidence of a recanting witness might be sufficient.
>
> [Because of these holdings] a convicted defendant in every criminal case (if it a due process problem, there is no reason to limit it to felonies or to sentences of confinement), will now be allowed and encouraged to pursue the witnesses and get them to recant. If he does so, he can relitigate his case forever. And all this is supposed to be based on *Herrera*, where the Court said that habeas corpus was not available because, "'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.' *Patterson v. New York*, 432 U.S. 197 (1977). To conclude otherwise would all but paralyze our system for enforcement of the criminal law."*

As the Court takes another small step down the path of paralysis, I can only respectfully dissent.

En banc.
Delivered September 12, 2001.
Do Not Publish.

Keller, P.J., *filed a concurring opinon [sic] in which HERVEY, and HOLCOMB, J.J., joined.*

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* *Ex parte Elizondo*, 947 S.W.2d 202, 215 (Tex. Cr. App. 1997) (Womack, J., dissenting to denial of rehearing).

CONCURRING OPINION

One unresolved question in our *Elizondo* jurisprudence is what constitutes the "new evidence" in perjury cases. Is the new evidence confined to what the testimony would have been if the perjury had not occurred? Or is the fact of perjury also "new evidence" that should be considered in determining whether a reasonable juror would convict? The present case illustrates the difference. The complaining witness (a child) lied at trial about her sexual history, denying that she had engaged in sexual activity with anyone except the applicant. Medical evidence, which provided objective evidence of sexual activity, bolstered her testimony. Had the truth been told, the medical evidence would have been largely irrelevant rather than corroborative of the complainant's testimony. To evaluate the new evidence without consideration of the fact of perjury, a habeas court would try to determine what the jury would have done if it had heard the truth the first time around. In other words, the court would look back and evaluate the impact of the different, true testimony on the jury in the original trial, without consideration of the fact that the complainant lied.

If, however, the fact of perjury is also considered to be part of the "new evidence," the complainant's credibility suffers. If the correct standard contemplates an awareness by the jury that the complainant perjured herself, the question becomes what the jury would do with the evidence in light of the complainant's lowered credibility. That is, the court would look forward and evaluate the outcome of a new trial, taking into account the fact that the complainant lied and, possibly, the reasons she gave for lying.

To avoid further remands and give this Court adequate information, I believe that the trial court should evaluate the case under both views of what constitutes "new evidence."

KELLER, Presiding Judge

Date filed: September 12, 2001
Do not publish

APPENDIX H

NO. C-2-4267-0569160-A

EX PARTE	§	IN CRIMINAL DISTRICT COURT
	§	
	§	NUMBER TWO OF
BRIAN EDWARD FRANKLIN	§	TARRANT COUNTY, TEXAS

THE DISTRICT COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF THE COURT

(Filed Jan. 19, 2000)

Dick DeGuerin and Neal Davis represent Applicant Franklin. Christy Jack, Steven Condor, and Charles Mallin represent the State. On June 8, 1999, Applicant Franklin filed his Application for Post-Conviction Writ of Habeas Corpus Based on Newly Discovered Evidence that Establishes His Actual Innocence. On June 23, 1999, the State filed a brief reply, which conceded that Applicant Franklin had at least met the burden required for an evidentiary hearing on his application for post-conviction writ. During the week of January 3, 2000, this Court conducted an evidentiary hearing that included the presentation of several witnesses and the introduction of numerous exhibits. Upon consideration of all the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court enters the following findings of fact, conclusions of law, and order:

I. FINDINGS OF FACT

1. Applicant Franklin is currently incarcerated and serving a life sentence under the custody and control of

Gary Johnson, who is the Director of the Institutional Division of the Texas Department of Criminal Justice.

2. On June 30, 1994, a grand jury indicted Applicant Franklin in cause number 0546216D for the aggravated sexual assault of thirteen year-old Brandi Rachall on March 5, 1994. **T.C.R. 6.**[1] On December 20, 1994, a grand jury returned an indictment in cause number 0569160R, which was a "direct reindictment" of cause number 0546216D and charged Applicant Franklin with the aggravated sexual assault of Brandi Rachall on March 12, 1994. **T.C.R. 3.**

3. Before Applicant Franklin's trial, the prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb spoke at length on various occasions with Brandi Rachall. **T.C.R. 70; A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19; *See* H.R.R.** The Court finds that Brandi Rachall lied when she failed

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[1] There are three different records presently available in Applicant Franklin's case. There is the record from his trial, which will be referred to as "I" and followed by "C.R." for clerk's record or "R.R." for the reporter's record. Roman numerals refer to the volume while arabic numerals refer to the page number of the trial record. There is Applicant Franklin's Application for Post-Conviction Writ of Habeas Based on Newly Discovered Evidence that Establishes His Actual Innocence, which will be referred to as "A. Exhibit" and followed by the exhibit number. Finally, only Rose Anna Salinas' testimony from the habeas corpus heaping, which is the only testimony from that hearing that is presently transcribed, will be referred to as "H.R.R." and followed by the page number of her testimony. Otherwise, references to other witness's testimony or evidence introduced at the habeas corpus hearing will be referred to generally as "*See* H.R.R.," and will be later supplemented with pinpoint cites once the full record of the hearing is transcribed. The record from Applicant Franklin's trial and the exhibits from his Application for Post-Conviction Writ were entered into evidence at the habeas corpus hearing.

to inform them that she had sexual relations with John Guerrro [sic] before Applicant Franklin allegedly sexually assaulted her. ***See*** **A. Exhibits 2, 3, 10, 11; H.R.R. 8-9, 15-16, 19;** ***See*** **H.R.R.** Rose Anna Salinas pointed out at the habeas corpus hearing that Brandi Rachall "was not at a very tender age at the time we went to trial. She was not that little. She knew the importance of what we were doing in this courtroom. Absolutely knew it. She's a very smart, intelligent girl." **H.R.R. 23.** Dr. Lamb testified at the habeas corpus hearing that minors are known to make false allegations of sexual assault. ***See*** **H.R.R.**

4. Applicant Franklin pled not guilty and was tried before a jury. **T.C.R. 224.** Michael Logan Ware and Leonard Schilling represented Applicant Franklin at trial. ***Id.*** Rose Anna Salinas and Christy Jack represented the State. ***Id.*** R.E. Thornton was the trial judge. ***Id.***

5. Rose Anna Salinas is a leading legal expert in Texas on sexual assault cases involving complainants who are children. Following her graduation from law school in 1989, she prosecuted criminal cases at the Tarrant County District Attorney's Office until 1998. **A. Exhibit 2; H.R.R. 3.** She was assigned to the Crimes Against Children Unit from 1992 to 1997. **A. Exhibit 2; H.R.R. 4.** She has been a frequent lecturer at seminars dealing with child abuse. **H.R.R. 5-6.** In 1997, she was recognized as a top prosecutor in Texas in child abuse cases. **H.R.R. 7-8.**

6. The Court finds that the State's case against Applicant Franklin was "difficult," in the words of Rose Anna Salinas, because of the little evidence supporting Brandi Rachall's story. ***See*** **T.C.R. 65-68, 86-89, 105-11; A. Exhibit 7; H.R.R. 21-23.**

7. Evidence showed that no eyewitnesses saw the alleged sexual assault. **IX T.R.R. 163;** ***See*** **H.R.R.**

8. No semen, hair, epithelial cells, or other trace evidence of Applicant Franklin was ever discovered or collected. **VIII T.R.R. 53; H.R.R 21;** ***See*** **H.R.R.**

9. Matt Rachall, who is Brandi Rachall's father, and her teacher never observed any physical signs of injury, such as scratches or abrasions, to Brandi Rachall, despite her descriptions of a violent sexual assault and bruising on her face. **T.C.R. 73; VIII T.R.R. 211-12; XIII T.R.R. Exhibit 2.**

10. Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense. **T.C.R. 69-73; VIII T.R.R. 49, 134-37; IX T.R.R. 149; X T.R.R. 56; XIII T.R.R. Exhibits 2, 7.** These inconsistencies ultimately caused the State to obtain a superseding indictment that changed the date of the alleged offense from March 5 to March 12, 1994. ***See*** **T.C.R. 3, 6; H.R.R. 43.**

11. The Court finds that, except for Brandi Rachall's testimony, no evidence at either Applicant Franklin's trial or habeas corpus hearing was introduced to show that Applicant Franklin was in Brandi Rachall's presence at Matt Rachall's house between March 11 and March 20, 1994, even though Brandi Rachall and the State contended that the sexual assault occurred at her father's house sometime during this spring break period. ***See*** **T.C.R. 3, 6;** ***See*** **T.R.R.;** ***See*** **H.R.R. 45-46, 55-56;** ***See*** **H.R.R.**

12. The Court finds that witness testimony and corroborative evidence, namely Applicant Franklin's sales receipts and employee time sheets, established that Applicant Franklin was never present with Brandi Rachall at her father's house between March 11 and March 20, 1994. ***See*** **VIII T.R.R. 149, 189-91; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** For example, during cross-examination at Applicant Franklin's trial, Matt Rachall was asked, "During that spring break week, do you remember whether or not the Defendant visited your home with his children?", to which Matt Rachall responded, "He did not." **VIII T.R.R. 149;** ***See also*** **VIII T.R.R. 189-91.** At the habeas corpus hearing, Matt Rachell testified that, to the best of his recollection, he never saw Applicant Franklin at Matt Rachall's house from March 11 to March 20, 1994. ***See*** **H.R.R.** Matt Rachall's testimony at the trial and habeas corpus hearing was based on calendars that he had made with the assistance of prosecutors Christy Jack and Rose Anna Salinas before Applicant Franklin's trial. ***Id.*****; XIII T.R.R. Exhibit 3.** Applicant Franklin's time sheets from Central Freight Lines showed that he worked every weekday in March 1994, from approximately 6:00 p.m. to midnight. **X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9.**

13. The Court finds that evidence at the trial and habeas corpus hearing revealed that March 6, 1994, was the only date in the entire month of March that Applicant Franklin was in Brandi Rachall's presence at her father's house. **VIII T.R.R. 149; X T.R.R. 88; XIII T.R.R. Exhibit 9; A. Exhibit 9;** ***See*** **H.R.R.** The State and several witnesses, including Brandi Rachell, testified that the claimed sexual assault definitely did not occur on March 6, 1994. **VIII T.R.R. 200-01; IX T.R.R. 149;** ***See*** **H.R.R.**

14. The Court finds that, because of the little evidence supporting the claimed sexual assault, the State's case against Applicant Franklin rested in large part on Brandi Rachall's testimony and credibility at trial. As prosecutor Christy Jack stated in her summation at trial, "What it boils down to is: Do you believe Brandi Rachall? When you set everything aside, do you believe Brandi Rachall?" **XI T.R.R. 11-12.** Rose Anna Salinas stated at the habeas corpus hearing that Brandi Rachall's credibility was "very important" and a "primary factor" in the jury's decision to convict Applicant Franklin. **H.R.R. 28-30.**

15. During direct examination at Applicant Franklin's trial, Brandi Rachall reiterated that she had no sexual relations before Applicant Franklin allegedly sexually assaulted her:

Q: Had you ever had sex before?

A: No.

IX T.R.R. 161. The Court finds that Brandi Rachell lied and committed perjury at Applicant Franklin's trial when she testified that she had no sexual relations before Applicant Franklin allegedly sexually assaulted her.

16. The Court finds that the State, to support Brandi Rachall's claim that Applicant Franklin sexually assaulted her, relied on testimony regarding only two pieces of physical evidence: a pair of her bloodstained underwear and a medical examination of her hymen that was conducted several weeks after the alleged offense. **A. Exhibit 2.**

17. Gena Guerrero, who is Brandi Rachall's mother, claimed that she discovered a bloodstain on Brandi

Rachall's underwear on March 21, 1991, a full day after her daughter had returned home from a trip to Waco. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero stated that, after she bleached and washed the underwear, she realized the blood could not have been from menstruation since Brandi Rachall had her period two weeks earlier. **XIII T.R.R. Exhibit 6; A. Exhibit 8.** Gena Guerrero explained that the bloodstain on the underwear was "extremely red" and "really red," in contrast to menstruation stains, which "are a darker red almost brown." ***Id.*** Dr. Lamb testified at trial that bleeding from a sexual assault would be "bright red," not the "brownish" color of menstrual blood. **VIII T.R.R. 61.**

18. Constance Patton, an expert serologist who worked several years for the crime lab of the Forth Worth Police Department, testified at trial and the habeas corpus hearing that a "bright red" bloodstain on the underwear indicated bleeding within the previous few hours. **X T.R.R. 77; *See* H.R.R.** She further stated that a bloodstain older than twenty four hours would appear "brown." ***Id.*** Dr. Lamb testified at the habeas corpus hearing that, in her experience, the "bright red" color of fresh blood quickly turns "brown" due to oxidation. ***See* H.R.R.**

19. The Court finds that witness testimony and corroborative evidence at the trial and habeas corpus hearing established that Gena Guerrero discovered the "extremely red" and "really red" bloodstain on the underwear approximately two weeks after Applicant Franklin had last been in Brandi Rachall's presence at Matt Rachall's house. **VIII T.R.R. 149, 189-91; IX T.R.R. 16-20; X T.R.R. 88; XIII T.R.R. Exhibits 3, 6, 9; A. Exhibits 8, 9; *See* H.R.R.**

20. Because of her "delayed outcry," Brandi Rachall did not undergo a medical examination until several weeks after the alleged sexual assault. **T.C.R. 72-73; XIII T.R.R. Exhibit 2; A. Exhibit 3; H.R.R. 18, 45-46;** ***See*** **H.R.R.** Dr. Lamb, who performed the medical examination, focused on any damage to Brandi Rachall's hymen. **VIII T.R.R. 51-62; A. Exhibit 3;** ***See*** **H.R.R.** An "interruption of the [hymen] tissue at 11:00 and down between 5:00 and 6:00 o'clock" caused Dr. Lamb to testify that Brandi Rachall's hymen had been penetrated. ***Id.*** Operating under the assumption that Brandi Rachall had no sexual relations before the claimed sexual assault, Dr. Lamb wrote in her medical report and testified at trial that the hymen damage was consistent with Brandi Rachall's claim that Applicant Franklin had sexually assaulted her. ***Id.***

21. The Court finds that the trial record and Rose Anna Salinas' testimony at the habeas corpus hearing unquestionably showed that the State's trial preparation, theory, and presentation were all based on Brandi Rachall's repeated assertions that she had no sexual relations before the alleged sexual assault. Rose Anna Salinas specifically testified that Brandi Rachall's supposed virginity before the alleged offense was "one of the most crucial factors" at Applicant Franklin's trial. **H.R.R. 28.** Rose Anna Salinas further stated that, if she had known that Brandi Rachall engaged in sexual relations before Applicant Franklin allegedly committed the offense, "every evaluation . . . made during the trial, during the preparation for the trial would have changed." **H.R.R. 42.**

22. The Court finds that the State introduced evidence to the jury at Applicant Franklin's trial about Brandi Rachall's hymen damage to show or at least

suggest that it was the sole result of Applicant Franklin sexually assaulting her. **VIII T.R.R. 51-62; XII T.R.R. 165-66; A. Exhibits 2, 3; *See* H.R.R.** At the habeas corpus hearing, Rose Anna Salinas testified that she "presented the case to the jury . . . with the theory that changes in the hymen of Brandi Rachall were due to the assault or claimed assault by Brian Franklin" and "that was the theory of the . . . Prosecution all the way through." **H.R.R. 14.**

23. The Court finds that the State introduced evidence to the jury about Brandi Rachall's lack of prior relationship with any males to show or at least suggest that she was a virgin before Applicant Franklin allegedly sexually assaulted her. **IX T.R.R. 135-37; XI T.R.R. 13-15.** Rose Anna Salinas testified that "the questions . . . asked about whether Brandi had had any other boyfriends was another way of asking and obtaining her answer that she had not had sex before . . . I wanted to establish she was very sexually naive and had no other experiences other than this sexual abuse by Brian Franklin." **H.R.R. 17.**

24. The Court finds that the State introduced evidence to the jury about Brandi Rachall's bloodstained underwear to show or at least suggest that it was the sole result of Applicant Franklin allegedly penetrating and breaking her hymen. **IX T.R.R. 16-20; XIII T.R.R. Exhibit 6; A. Exhibits 2, 8; H.R.R. 50-51; *See* H.R.R.**

25. The Court finds that the State introduced evidence to the jury about Brandi Rachall having nightmares to show or at least suggest that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 28-29, 197; XI T.R.R. 17, 41; *See* H.R.R.**

26. The Court finds that the State introduced evidence to the jury about Brandi Rachall having migraines to show or at least suggest to the jury that they were the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 29-30; *See* H.R.R.**

27. The Court finds that the State introduced evidence to the jury about Brandi Rachall no longer wearing clothes that "[came] above her ankle" to show or at least suggest that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27-28. *See* H.R.R.**

28. The Court finds that the State introduced evidence to the jury about Brandi Rachall going to counseling to show or at least suggest to that it was the sole result of Applicant Franklin allegedly sexually assaulting her. **IX T.R.R. 27, 197; H.R.R. 14-16; *See* H.R.R.**

29. On February 24, 1995, the jury found Applicant Franklin guilty and sentenced him to life imprisonment. **T.C.R. 224; XI T.R.R. 46; XII T.R.R. 177.**

30. Applicant Franklin directly appealed his conviction, which the Second Court of Appeals affirmed in an unpublished opinion on October 17, 1996, in cause number 02-95-00084-CR. Applicant Franklin filed a Petition for Discretionary Review, which the Court of Criminal Appeals denied on February 26, 1997.

31. On May 15, 1998, prosecutor Christy Jack sent defendant's trial counsel Leonard Schilling a letter stating, "Please find enclosed information that was brought to our attention on May 13, 1998, which may or may not concern the Brian Franklin case." **A. Exhibits 5,10, 11.**

32. Sent with prosecutor Christy Jack's letter were various affidavits, police investigation notes, and other information relating to new claims that Brandi Rachall had recently made about having sexual relations with John Guerrero, who was her stepfather at the time. ***See Id.***

33. In an affidavit dated May 5, 1998, Brandi Rachall stated that she had daily sexual relations with her stepfather for over eleven years. **A. Exhibit 6.**

34. This eleven-year period of daily sexual relations covered the time before, during, and after the alleged sexual assault that Brandi Rachall claimed Applicant Franklin committed on her. ***Id.***

35. The Court finds that Brandi Rachall's May 1998 affidavit to police directly contradicted her own testimony, as well as the testimony of other witnesses, adduced before and during Applicant Franklin's trial. ***Id.***; ***See*** **T.C.R.**; ***See*** **T.R.R.**; **A. Exhibits 2, 3, 10, 11;** ***See*** **H.R.R.**

36. The Court finds that the diligent pre-trial and trial investigations of Applicant Franklin's counsel did not and could not have uncovered this new evidence regarding Brandi Rachall's sexual relations with John Guerrero. ***See*** **A. Exhibits 10, 11.**

37. The Court finds that whether a complainant in a sexual assault case has a single perpetrator or multiple perpetrators will determine what evidence the State will introduce at trial. Rose Anna Salinas testified at the habeas corpus hearing that it is "important to know the sexual history, if there is one, of a child who is the complaining witness in a case of sexual assault . . . One of the reasons you need to know that is because like this particular case

. . . you may not be able to bring that medical evidence to a jury . . . Another reason is if you have psychological type of trauma that is evidence . . . you may be limited." **H.R.R. 9-10.**

38. The Court finds that, in light of the new evidence, testimony about the damage to Brandi Rachall's hymen would not have been introduced at Applicant Franklin's trial, Rose Anna Salinas testified, "I certainly would have never been able to offer the medical evidence that I offered against Brian Franklin. I would have never been able to offer that against him. I wouldn't have presented it, I couldn't. I could not say that the injury was caused by him . . . I can tell you right now that that medical evidence would not have been offered against him." **H.R.R 24-25, 27; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

39. The Court finds that, in light of new evidence, testimony about Brandi Rachall's bloodstained panties would not have been introduced at the trial. Rose Anna Salinas testified that it was "very likely that the testimony [about the bloodstained underwear] . . . would not have been admissible." **H.R.R. 51; A. Exhibits 2, 3, 10, 11; *See* H.R.R.**

40. The Court finds that, in light of the new evidence, Brandi Rachall almost surely would have never testified at trial. Rose Anna Salinas testified, "To me [Brandi Rachall] was very credible . . . [I] believed her . . . Otherwise, I would have never gone into court with this case," "I just know that I no longer find her credible," and "her credibility as presented to this jury [at Applicant Franklin's trial] was deeply and adversely affected." **H.R.R. 23, 49, 61.**

41. The Court finds that, in light of the new evidence, the State would have dismissed the case against Applicant Franklin or at the very least requested a mistrial at Applicant Franklin's trial. Rose Anna Salinas stated in her affidavit, "Had I known that . . . Brandi Rachall intentionally withheld evidence of her previous sexual contact with John Guerrero, I would have had such serious doubts about Applicant Franklin's guilt that I would have immediately dismissed the charges against him." **A. Exhibit 2.** At the habeas corpus hearing, Rose Anna Salinas testified, "I thought I could evaluate [Applicant Franklin's] case properly to prosecute it and obviously I was wrong. [Brandi Rachall] fooled me" and that "I might have moved to dismiss this case. And that's a very strong possibility that would have happened . . . [At] the very least [I] would have joined the defense in a motion for mistrial." **H.R.R. 54, 63.**

42. The Court finds that, in light of the new evidence, the jury's verdict at Applicant Franklin's trial would have been adversely affected and probably different on retrial. Rose Anna Salinas testified at several points during the habeas corpus hearing that Brandi Rachall's lies concerning her sexual history "permeated the case" and "adversely affected . . . the integrity of the jury's verdict." **H.R.R. 30, 48.** At the end of her testimony, Rose Anna Salinas stated, "My opinion is that I don't believe [Applicant Franklin] got a fair trial" and "the bottom line is this jury verdict cannot be trusted because of the false information." **H.R.R. 62, 67.**

II. CONCLUSIONS OF LAW

1. The purpose of a writ of habeas corpus, known as the "Great Writ" because it dates back at least to 1679 England, is to allow an incarcerated individual to challenge the lawfulness of his confinement.

2. The Due Process Clauses of the United States and Texas Constitutions, along with Article 11 of the Texas Code of Criminal Procedure, give an incarcerated individual the right to file an application for writ of habeas in certain situations where that individual's fundamental constitutional rights have been violated.

3. "The central purpose of any system of criminal justice is to convict the guilty and free the innocent." ***Herrera v. Collins***, 506 U.S. 390, 398 (1993). Over the last few years, the Court of Criminal Appeals has frequently cited this language in shaping the doctrine of post-conviction habeas corpus based on new evidence that establishes an individual's actual innocence. ***See, e.g., State ex rel. Holmes v. Court of Appeals***, 885 S.W.2d 389, 397 (Tex. Crim. App. 1994); ***Ex parte Elizondo***, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). "The incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. It follows that claims of actual innocence are cognizable by this Court in a post-conviction habeas corpus proceeding whether the punishment assessed is death or confinement." ***Ex parte Elizondo***, 947 S.W.2d at 205.

4. ***Ex parte Elizondo*** held that the ***Holmes*** test was too strict for establishing actual innocence in an application for post-conviction writ.

> At the outset, we perceive an anomaly in our ***Holmes*** opinion, which describes the ultimate criterion for relief under actual innocence test as if our task were to decide whether the evidence of guilt could support a conviction in light of the newly discovered evidence. Such characterization is misleading because, if habeas corpus relief is to be conditioned upon a finding that no rational juror could convict the applicant after introduction of the newly discovered evidence, it becomes theoretically impossible for any habeas applicant to sustain this burden because exculpatory evidence can never outweigh inculpatory evidence under this standard of [legal] sufficiency.

Ex parte Elizondo, 947 S.W.2d at 205.

5. ***Elizondo*** altered the ***Holmes*** test and replaced it with a more lenient and realistic standard. "It is not reasonable to hold, and we reject the implication of ***Holmes***, that confidence in a verdict is undermined only when the newly discovered evidence renders the State's case legally or constitutionally insufficient for a conviction." ***Id.*** at 206.

6. Under ***Elizondo***, the court must "assess the probable impact of the newly discovered evidence upon the persuasiveness of the State's case as a whole . . . . [and] must necessarily weigh such exculpatory evidence against the evidence of guilt adduced at trial." ***Id.*** at 206. The applicant is entitled to relief if he can show, by "clear and convincing evidence," that the "newly discovered evidence, if true, creates a doubt as to the efficacy in the verdict and that it is probable that the verdict would be different [on retrial]." ***Id.*** "The court charged with deciding such a claim should make a case-by-case determination about the reliability of the newly discovered evidence . . . Obviously,

the stronger the evidence of the prisoner's guilt, the more persuasive the newly discovered evidence must be." *Id.* at 207.

7. The Court concludes that Applicant Franklin has demonstrated, through clear and convincing evidence, there was no strong inculpatory evidence at his trial. Indeed, Rose Anna Salinas testified at the habeas corpus hearing that the State's case against Applicant Franklin was "difficult" at trial.

8. No eyewitnesses saw the alleged sexual assault. No trace evidence was discovered or collected. Matt Rachall and Brandi Rachall's teacher never observed any physical signs of injury to Brandi Rachall, despite her claims of a violent sexual assault and bruising on her face.

9. Brandi Rachall and those to whom she spoke about the alleged sexual assault inconsistently identified the date, time, and location of the alleged offense, which forced the state to obtain a superseding indictment that changed the date of the alleged offense.

10. The State and Brandi Rachall contended that the alleged offense definitely occurred sometime between March 11 and March 20, 1994.

11. The Court concludes that the credible witness testimony and corroborative evidence, namely Applicant Franklin's sales receipts and employee time sheets, show that he was never present with Brandi Rachall between March 11 and March 20, 1994.

12. The Court concludes that, because of the little evidence supporting the alleged sexual assault, the State's case rested in large part on Brandi Rachall's testimony and credibility, along with two pieces of physical evidence:

a pair of bloodstained underwear and a medical examination of her hymen.

13. The Court concludes that, as Rose Anna Salinas' affidavit and her testimony at the habeas corpus hearing show, the relevance of the bloodstained underwear and hymen damage depended on Brandi Rachall's repeated lies before and during trial when she failed to reveal she had sexual relations prior to Applicant Franklin allegedly sexually assaulted her.

14. The Court concludes that, as Rose Anna Salinas testified, the State's trial preparation, theory, and presentation were all based on Brandi Rachall's repeated representations before and during trial about her sexual history.

15. The Court concludes that Applicant Franklin has shown, through clear and convincing evidence, that Brandi Rachall's lies and perjury regarding her sexual history, superimposed over the weak inculpatory evidence at his trial, create a doubt as to the efficacy in the jury's verdict at his trial and would probably change the verdict on retrial.

16. The Court concludes that Brandi Rachall repeatedly lied about her sexual history to prosecutors, police, Child Protective Services, mental health counselors, and medical doctor Jan Lamb, before Applicant Franklin's trial.

17. The Court concludes that Brandi Rachall committed perjury when she testified about her sexual history at Applicant Franklin's trial.

18. The Court concludes that the new evidence casts doubt on Brandi Rachall's credibility as a witness.

19. The Court concludes that the new evidence casts doubt on whether Brandi Rachall's hymen damage or bloodstained underwear was the sole result of Applicant Franklin allegedly sexually assaulting her.

20. The Court concludes that the new evidence casts doubt on whether Brandi Rachall's nightmares, migraines, counseling, or change in dress were the sole result of Applicant Franklin allegedly sexually assaulted her.

21. The Court concludes that the new evidence, as Rose Anna Salinas repeatedly stated at the habeas corpus hearing, undermined the integrity of jury's verdict at Applicant Franklin's trial and would have probably resulted in a different verdict on retrial.

22. The Court concludes that the new evidence, as Rose Anna Salinas testified, prevented Applicant Franklin from receiving a fair trial under the United States and Texas Constitutions.

23. The Court concludes that the new evidence, as Rose Anna Salinas emphasized, would have changed the State's evaluation of the case. The State would have dismissed the case or at the very least joined the defense in a motion for mistrial.

24. The Court concludes that Applicant Franklin has methodically shown, through clear and convincing evidence, that his conviction based upon the lies and perjury of Brandi Rachall violated the Due Process Clauses of the United States and Texas Constitutions.

25. The Court concludes that, in light of the new evidence, Applicant Franklin is being unlawfully confined and is constitutionally entitled to a new trial under

Elizondo. As Rose Anna Salinas eloquently stated at the end of the habeas corpus hearing, the new evidence:

> goes to something much more serious for me. And I think anybody who knows me knows that I take it very seriously when I ask a jury to send someone to prison for life. I have to be sure about my case. I always prosecuted cases that way. And to find out years later that this information has now come forward and that there is someone in prison who possibly is innocent is very, very serious to me. So it goes beyond just being displeased with [Brandi Rachall]. I thought I could evaluate that case properly to prosecute it and obviously I was wrong. She fooled me. * * * My opinion is that I don't believe [Applicant Franklin] got a fair trial * * * The bottom line is this jury verdict cannot be trusted because of the false information.

H.R.R. 53-54, 62, 67.

III. ORDER OF THE COURT

Upon consideration of the evidence relating to Applicant Franklin's application for post-conviction writ, including the demeanor of witnesses that appeared at the habeas corpus hearing, this Court finds that Applicant Franklin's conviction based upon the lies and perjury of Brandi Rachall at his trial violated the Due Process Clauses of the United States and Texas Constitutions, and that he is being unlawfully confined and is constitutionally entitled to a new trial.

Pursuant to Article 11 of the Texas Code of Criminal Procedure, the clerk is hereby ordered to prepare a record of all papers in cause number C-2-4267-0569160-A and

transmit it to the Court of Criminal Appeals without delay. The record shall include, but is not limited to, pleadings, exhibits and affidavits filed in the habeas corpus proceeding, the original record of Applicant Franklin's original trial, as well as a copy of these findings of fact, conclusions of law, and order of the Court.

It is further ordered that copies of this order be served upon Applicant Franklin, his counsel, and counsel for the State.

Signed this 3rd day of February 2000.

/s/ Wayne Salvant
JUDGE PRESIDING

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10641

BRIAN EDWARD FRANKLIN

Petitioner-Appellant

v.

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC

(Filed Mar. 16, 2005)

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM*:

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH

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* For the reasons previously stated in his panel dissent, Judge Garza dissents from the court's denial of Franklin's petition for en banc rehearing.

CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith Brown Clement
United States Circuit Judge

APPENDIX J

U.S. Const. Amend. V

→ Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

→ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the

loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

> **(A)** the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(B)(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence

that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the

United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> **(A)** the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> **(B)** the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this

section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

RECORDS AND BRIEFS

Supreme Court, U.S.
FILED
NOV 7 - 2005
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(2)

No. 04-1702

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN EDWARD FRANKLIN,
Petitioner,
v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether Franklin made a sufficient showing of actual innocence to warrant the creation of an exception to the provisions of the AEDPA statute of limitations.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian Edward Franklin is a Texas prison inmate seeking a writ of certiorari to review the opinion and judgment of the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals denied Franklin's petition for certificate of appealability ("COA") from the district court's dismissal of Franklin's federal habeas petition, challenging his conviction for aggravated sexual assault of a child under the age of fourteen, because it was time-barred and not entitled to equitable tolling. In his petition for certiorari, Franklin presents one question relating to the Fifth Circuit's denial of his COA. Because the lower court properly determined that reasonable jurists would not find it debatable that Franklin failed to make a sufficient showing of actual innocence to warrant the creation of an exception to the AEDPA statute of limitations, and such remedies would neither prevent a miscarriage of justice nor alleviate inequity in this case, certiorari should be denied.

STATEMENT OF THE CASE

I. State Proceedings

Franklin was indicted by a Tarrant County, Texas grand jury, for committing aggravated sexual assault against Brandi Rachall, a thirteen-year-old girl. Tr at 3.[1] Franklin pleaded not guilty, and a jury convicted him and assessed a life sentence on February 25, 1995. 7 SF 149; Tr at 3, 209, 219, 224. The Second Court of Appeals affirmed his conviction on October 17, 1996. *Franklin*

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[1] "Tr" refers to the clerk's record from Franklin's trial followed by the relevant page number(s).

"SF" refers to the statement of facts from Franklin's trial, preceded by the relevant volume number and followed by the relevant page number(s).

"SWH" refers to the statement of facts from the evidentiary hearing held on Franklin's application for state writ of habeas corpus, preceded by the relevant volume number and followed by the relevant page number(s).

v. State, No. 2-95-084-CR (Tex. App.– Fort Worth, 1996, pet. ref'd) (not designated for publication). The Court of Criminal Appeals refused his PDR on February 26, 1997. *Franklin v. State*, PDR-157-97 (Tex. Crim. App. 1997).

On May 15, 1998, the Tarrant County District Attorney's Office notified Franklin that Brandi had provided an affidavit to the police on May 5, 1998, swearing that John Guerrero, her stepfather, had been touching her inappropriately since she was six and had been penetrating her vagina with his penis since she was eleven years old, ending on March 1, 1998. *Ex parte Franklin*, Application No. 44,521-01,at 34-35.

On June 8, 1999, over a year after Franklin learned of this new evidence, Franklin filed a state application for writ of habeas corpus, claiming only that he had newly discovered evidence that he was actually innocent of the crime for which he was convicted. *Id.* at 2. The state district court held an evidentiary hearing to resolve controverted, unresolved facts. 1-5 SWH. The state district court entered findings of facts and conclusions of law recommending that relief be granted. Dist. Ct. Order Nov. 5, 2001. The Court of Criminal Appeals remanded the case to the district court to apply the *Herrera v. Collins*, 506 U.S. 390 (1993), standard as interpreted in *Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). CCA Order September 12, 2001, at 2-3. The district court entered supplemental and revised conclusions of law recommending that relief be granted. Dist Ct Order November 5, 2001. On April 10, 2002, the Court of Criminal Appeals determined that the district court had failed to properly apply *Elizondo*, reviewed the evidence, and denied Franklin's application for writ of habeas corpus. *Ex parte Franklin*, 72 S.W.3d 671, 678 (Tex. Crim. App. 2002).

II. Federal Habeas Proceedings

On September 9, 2003, seventeen months after the Court of Criminal Appeals denied his state writ application, Franklin filed a federal petition for writ of habeas corpus, challenging the state courts' determinations both on direct appeal, regarding his vouching claim, and on state habeas, regarding his actual innocence claim, raising unexhausted claims of perjury, and asserting a substantive claim of actual innocence. *Franklin v. Dretke*, 4:03cv934-Y, D.E. 1 (N.D. Tex.). The magistrate court issued findings, conclusions, and a recommendation ("R&R"), to dismiss the petition with prejudice as time-barred. Franklin objected; the district court adopted the R&R and noted that Franklin failed to make a sufficient showing of actual innocence to overcome the time-bar. D.E. 31, 32 at 2-3. The district court denied Franklin a COA. D.E. 36 at 1.

Further, Judge Clement denied a COA, finding that Franklin had not shown that reasonable jurists would find the district court's resolution debatable or wrong. *Franklin v. Dretke*, No. 04-10641 (5th Cir. Oct. 20, 2004); Pet. App. B. On February 16, 2005, a panel of the court entered an order denying Franklin's motion for reconsideration with one judge dissenting in part. Pet. App. A.[2] The Fifth Circuit denied rehearing *en banc* on March 16, 2005. Pet. App. I.

The Fifth Circuit did not reach the issue of whether a showing of actual innocence could excuse a petitioner from the AEDPA statute of limitations, because it was not debatable that Franklin failed to make a showing of innocence. Pet. App. A.

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[2] Franklin refers to this as a court opinion denying COA, however, it is an Order denying his motion for reconsideration, which does not entail the same standard as determining whether the petitioner is entitled to a COA. However, in denying his motions for reconsideration, the Fifth Circuit implicitly found that his claims would not be debatable by jurists of reason.

Franklin's petition for writ of certiorari followed.

STATEMENT OF THE FACTS

I. Evidence Presented at Trial

A. The Date of the Offense

At the time of the offense, Brandi Rachall, the complainant, was living with her mother, Gena Guerrero, and her stepfather, John Guerrero, with alternating weekend and holiday court-ordered visitation with her father, Matthew Rachall and his girlfriend, Kim Harris. 8 SF 130-132. The assault took place at Rachall's house during one of Brandi's visitations, but she did not remember exactly who was at the house at the time, and she was unable to pinpoint the specific date of the assault, which is common for a child victim of sexual assault regardless of age or intelligence. 8 SF 50, 69-70; 9 SF 90, 149-150. She was able to narrow the time frame to sometime between March 6 and March 18, 1994. 9 SF 149. She realized that it could not have been the day that she initially thought it was, March 5, and Rachall, knew that Franklin had not been at his house on March 5. 8 SF 144; 9 SF 139, 206; 10 SF 43-73.

Rachall had known Franklin for several years, had worked with him on the police force, had found out in December 1993 that Franklin was going through a divorce, and had him over for a small New Year's Eve party. 8 SF 134-137. Starting in January of 1994, Franklin began to follow a routine of bringing his children over to Rachall's house the same weekend that Rachall had visitation, staying anywhere from 10-11 p.m until 1-2 a.m., depending on what they were doing. 8 SF 134-137. There would be times that Rachall had to work on the weekends that Franklin would be present at his home prior to Rachall going to work and would leave when Rachall left for work at 10 p.m. 8 SF 137.

Franklin was working at a loading dock, Mondays through Fridays, typically starting at 6 p.m. and finishing at midnight or after, but the hours fluctuated. 8 SF 148; 10 SF 83, 87-88, 90. Franklin did not work on Saturday or Sunday, March 12th and 13th. 10 SF 87, 92; Defense Exhibit 9.

Rachall had visitation with Brandi and his son the weekend of March the 4th through the 6th. 8 SF 141-143. On Sunday, March 6th, Rachall hosted a birthday party for his son at his house, with approximately fifteen people in attendance, mostly relatives. 8 SF 141-143. Franklin attended this party. 8 SF 144. Rachall took Brandi and his son back to their mother's at 6 p.m. 8 SF 143.

B. Spring Break

Rachall's next visitation began on March 11, and he had visitation for the whole week, because it was spring break. 8 SF 144-145. Rachall worked March 11 through March 14, but took the rest of the week off to spend with his children. 8 SF 145. Rachall conceded that it was possible that Franklin visited his home on March 13, 1994, but did not have specific knowledge of it. 8 SF 148, 190. Michelle Ransom, a CPS worker, testified that both Rachall and Harris said that Franklin had not been to their house since March 6, but neither Rachall nor Harris recalled telling her that. 8 SF 200; 10 SF 33, 118.

Brandi thought that, on the day of the assault, Rachall and Franklin had gone somewhere earlier in the day and came back smelling like marijuana. 9 SF 150-153. Rachall testified that he did smoke marijuana, so it could be true that there was drug use going on. 8 SF 184. When they started talking badly about her mother, Brandi got upset, started crying, and went to her room, where she smashed a toy guitar in anger before she went out into the backyard. 9 SF 153-56. There, she stood by the back fence looking into the woods as the sun went down and it turned from light to dark. 9 SF 153-56. It was cold, chilly. 9 SF 221.

Franklin came outside and asked what she was doing. 9 SF 157-159. She decided to go back inside by going around the side of the house, because she did not want to walk past Franklin. 9 SF 157-159. She was pretty sure that her dad and Kim were inside. 9 SF 163. Rachall described the layout of the backyard and confirmed that one of the gates had been wired shut around Christmas. 8 SF 174-177, 187. Brandi was by the gate, when Franklin grabbed her shoulder from behind causing her to fall to the ground, hitting the back of her head against the house. 9 SF 157-159. Franklin pulled Brandi's jeans down to her ankles, pinned her hands behind her by holding her wrist and told her to just be still or just be quiet. 9 SF 160-161. She tried to scream, but nothing would come out. 9 SF 161. She felt him put his penis inside her vagina, hurting her. 9 SF 161-62. It lasted for four or five minutes before he got up and walked over to the fence where she thought he might have been masturbating, seeing his hands moving like he was shaking something in front of him, but his back was to her. 9 SF 161-62. He went back inside, and she picked herself off the ground, brushed leaves off her and walked to the porch where she waited until he left to go back inside, about fifteen minutes. 9 SF 162-163.

Brandi said that she had never dated a boy and had not really been interested in dating. 9 SF 137. She also testified that she had never had sex before. 9 SF 161. Rachall had not seen any bruises, scratches or abrasions that were unusual on Brandi during the month of March. 8 SF 211-212.

When Brandi went back inside, she got a Coke and a bottle of aspirin and walked behind the couch where Kim was sitting watching TV, into her room. 9 SF 164. She listened to music, was in pain, took up to nine aspirin, did not know what to do, and did not sleep. 9 SF 165-66.

The next morning Brandi took a shower and noticed blood on her underwear, which she put in her bag. 9 SF 167. She also

called her mother; she wanted to go home, but she did not want to tell her mother what happened, so she stayed. 9 SF 168-69. Gena Guerrero, Brandi's mother, testified that Brandi called her several times on Monday, March 14, 1994, and that it was unusual for her children to call her when they were with their father, even to tell her they would be late, although they did that on rare occasion. 9 SF 13-15. She said it seemed like Brandi just needed to hear her mother's voice. 9 SF 13-15.

On Thursday, March 17, Rachall, who was under the impression that Franklin and his children would be visiting that week because of spring break, realized that he had not seen Franklin that week and drove his family by Franklin's apartment while they were in that part of town to see what was going on. 8 SF 149-150. Rachall and Harris both remembered that Brandi refused to come inside, that she appeared upset and was adamant about not even getting out of the car. 8 SF 151; 10 SF 40. Brandi did not want to see him. 9 SF 170.

On Friday, Rachall, his family, and a neighborhood friend named Evan, who was 14 years old at the time, headed out on a camping trip, but the car broke down and Rachall had to transport everyone back to the house, one by one, on his motorcycle, Brandi being the first one back to the house. 8 SF 155. While she was at the house alone, Brandi called Mrs. Mancel and told her she was afraid, but did not tell her about the assault. 9 SF 173. Rachall testified that they fixed the car, but did not leave until the next morning, so everyone stayed overnight at the house, including Evan. 8 SF 156-57.

On Saturday, they left for their camping trip. 8 SF 156-57. Brandi and Evan slept in the car on the camping trip. 8 SF 158. Brandi said that she did not tell Evan about the assault because Evan was just some kid who hung around the house a lot and they were not that good of friends. 9 SF 178. On Sunday, March 20, Rachall took Brandi home late, around 9 p.m. 8 SF 157-59.

Monday morning, Gena Guerrero did laundry and found a pair of underwear stained with bright-red blood in Brandi's bag. 9 SF 18-19, 49, 52. She testified that the blood was brighter red than normal spotting and that Brandi had just had her period two weeks earlier. 9 SF 18-19. Constance Patton, a forensic serologist with Tarrant County Medical Examiner's Office, testified that within six to eight hours the color of blood would turn a dark red to brownish color. 10 SF 75-81. She also testified that one cannot visually tell the difference between menstrual blood and other blood. 10 SF 79. She conceded that description of color is subjective. 10 SF 80.

Rachall's next visitation was the weekend of April 1st through the 3rd. 8 SF 159. Brandi told her mother that she did not want to go, which was the first time that had ever happened, but she went anyway. 9 SF 20. Brandi did not want to go, because she did not want to see Franklin who was always over there. 9 SF 180. Rachall did not think that Franklin visited his home that weekend. 8 SF 159. Rachall noticed that Brandi did not sleep in her room, but in the living room where Kim was, but he figured they had fallen asleep watching television. 8 SF 160.

On Wednesday, April the 6th, Rachall exercised his Wednesday visitation, which he did not usually do. 9 SF 180-81; 9 SF 54-55. When she returned, Brandi was sick, did not feel good, was upset, and complained to her mother that her father had given her a hard time about not wanting to go to Evan's birthday party that night, suggesting that she should go even when she did not want to. 9 SF 55-56, 182. They had gone to dinner instead. 9 SF 21. Rachall testified that he did not recall having visitation on April 12th or on any weekday during the month of April. 8 SF 210-11. Gena Guerrero testified that Rachall never had visitation on a Tuesday. 9 SF 21.

C. The Outcry

On April 13, 1994, a few minutes after 3 p.m. Brandi came into Jean Mancel's classroom, during her planning period, when no one else was in the room, looking very subdued, very serious, and sad. 8 SF 85. Mrs. Mancel talked with Brandi for about 45 minutes, Brandi made her promise not to tell, and then conveyed information to her about having been sexually assaulted. 8 SF 85-88. Both Mrs. Mancel and Brandi were crying. 8 SF 86-87. Mrs. Mancel encouraged Brandi to tell her mother, but she was afraid to. 8 SF 88. Brandi had not planned on telling Mrs. Mancel about the assault. 9 SF 183-84. Mrs. Mancel did not write down any of the information Brandi had conveyed on the day that she conveyed it. 8 SF 89.

D. Mrs. Mancel's Report to CPS

On April 16, 1994, the day before Mrs. Mancel's wedding, she spoke with a therapist friend about Brandi's outcry, and he helped her call CPS to report it, holding the phone and dialing the numbers for her, reminding her to breathe while she was crying. 8 SF 90-94. Her report to CPS stated that Brandi was raped by one of her father's friends on April 12, 1994, a Tuesday night, and her father allowed his friend to rape Brandi because it was his birthday, while her father and the woman he lives with, Kim, were in the other room. 8 SF 117-119. It says that Brandi was raped twice, once in her room and once outside in the backyard when she tried to run. 8 SF 117-118. The report said that Brandi told her mother on April 13, 1994, but that her mother did not believe her, thought that Brandi probably brought the incident upon herself, and called her a slut. 8 SF 118-119. The report said that the perpetrator covered Brandi's mouth to keep her from yelling, and that she broke her guitar when she hit him with it. 8 SF 119. Brandi was supposed to have visitation with her father the next weekend, but doesn't know if she would be going. 8 SF 119. Gena Guerro testified that she had never called her daughter a slut or said that she did not believe her. 9 SF 60, 63.

Jim Wilson, an intake worker for CPS, testified that he enters information into the report as the informant provides it, but it is common for informants to have the information wrong. 10 SF 7-17. Turner agreed that people making the reports are often upset, which may contribute to inaccuracy in the intake reports. 8 SF 217-218. She also agreed that delayed outcries are common and that children have difficulty pinpointing dates. 8 SF 217-218.

E. CPS & the Police

Rachall's next visitation began on April 15th. 8 SF 160-161. Betty Turner, a CPS worker, said that Brandi's case was high priority, meaning that CPS had to respond within twenty-four hours, because there was an indication that the parents were not protective. 8 SF 221-25. John McCaskill, a detective with the Fort Worth Police, who went to the police academy with Franklin, became involved in the investigation on April 16th over dispatch and went to see Gena. 9 SF 70-75. CPS was not there yet, but the officers went to Rachall's house when they learned Brandi was there on visitation, because they were concerned about her safety. 9 SF 75. Rachall was not at home, so they returned to Gena's house and were met by the CPS workers. 9 SF 76. Turner testified that Brandi's mother was tearful and upset that it had happened and that Brandi had not come to her. 8 SF 225. She also testified that Brandi's stepfather was hurt that Brandi would not have come to him because he was really comfortable talking with her about sexuality. 8 SF 226. Neither seemed to have known. 8 SF 226.

The CPS workers and officers then went to Rachell's house. 8 SF 160-161. Turner testified that Kim immediately assumed Brandi's mother had made something up. 8 SF 228. Rachall did not remember thinking that his ex-wife would have been causing trouble. 8 SF 163-64. When she saw CPS, Brandi thought "oh my gosh, she told." 9 SF 186. Turner testified that she saw Brandi crying. 8 SF 230. Brandi did not tell CPS about the assault, because she did not want her father to know. 9 SF 188. She could hear him blaming her mother, so she went along with that. 9 SF

188. At the time, Turner only told Rachall that the allegations involved sexual abuse. 8 SF 238-39. Rachall was told that the children were not safe at his house and he had to take them home. 8 SF 163. He drove Brandi and her brother home. 8 SF 163.

After Brandi came home on April 16th, Brandi told her mother what happened. 9 SF 23-24. Her mother called Detective Warren and conveyed what Brandi had told her, then she called Rachall to let him know. 9 SF 23-24. Gena Guerrero was not surprised by the identity of the perpetrator. 9 SF 65.

F. The Phone Call

After CPS had been to Rachall's house, Franklin dropped in with his children, and Rachall told him what had happened. 8 SF 18-23; 10 SF 18-23. Franklin agreed that Rachall's ex-wife was starting trouble. 8 SF 166. Around midnight, Gena called and talked to Harris, who told Rachall to get on the other line. 8 SF 166-168. Gena told them that Franklin had raped Brandi. *Id.* Harris began to say very loudly "Oh my God," and "He's here right now." 8 SF 168. After telling Harris to calm down, Rachall went to Harris, who was standing just outside the backdoor, and saw Franklin listening at the door. 8 SF 169. When Franklin saw Rachall, he looked surprised, like he didn't know what to do or say. 8 SF 169-170. He froze for just a second, then said "I guess I better go." *Id.* He picked up his children, and went out the door without asking what was wrong or what was going on. *Id.*

G. Police Interview

On April 17th, Officer McCaskill took Brandi's statement. 9 SF 78. Brandi's mother and stepfather were with her, but they were not in the room when he took the statement. 9 SF 27, 78. McCaskill had been with crimes against children for only a few months without any special training prior to taking Brandi's statement. 9 SF 92. He did not have any paperwork or reports of any account of what had occurred. 9 SF 81. He took her statement and asked her more detailed questions. *Id.* In

answering his questions, Brandi was consistent and became emotional several times. *Id.* To his knowledge, there was no inconsistent report other than the one provided by the teacher to CPS. 9 SF 119. He did not know about an offense report by Chief Haenes with an offense date of March 5th. 9 SF 124.

H. Sexual Assault Examination

Brandi's mother, stepfather, and a CPS worker, Ransom, were with Brandi when Dr. Jan Lamb, doctor of pediatrics, examined Brandi. 8 SF 45; 9 SF 191. Dr. Lamb said that because she was not the outcry witness, she did not interview Brandi as extensively as she otherwise would have, but that it was important to know what had happened in order to take a medical history and make a diagnosis. 8 SF 45-49. She testified that Brandi told her that she was raped by Brian Franklin, a friend of her father's, in March of 1994. 8 SF 45-49. Brandi told her that Franklin had put his penis inside her, but that she did not think that he ejaculated inside of her; rather, she saw him ejaculate as he masturbated after the assault. 8 SF 51. Dr. Lamb testified that Brandi appeared very frightened and reluctant to talk, which is common. 8 SF 52.

Dr. Lamb testified that she found tears in Brandi's hymen at the positions of both 6 o'clock and 11 o'clock, that the hymen tends to rupture more frequently between three and nine o'clock than above, so that the rupture at 11 o'clock was indicative of blunt force, penetrating trauma. 8 SF 56, 59-60. Such injuries would be consistent with pain and the victim bleeding at the time of the offense. 8 SF 60-61. She testified that out of 450 girls she had evaluated in Fort Worth, she had only found injuries like this in two or three, injuries which she would characterize as dramatic. 8 SF 61-62. She testified that blunt force trauma itself is not evidence of rape, but of intercourse, penetration, whether it is forcible or consensual. 8 SF 74-76.

I. Mrs. Mancel's Written Statement

On April 20, 1994, Mrs. Mancel typed out a statement at the request of Chief Haenes, from memory, without assistance or being able to see what she had told CPS. 8 SF 93-96. She was upset while she was typing it, because she did not know that she would have to go through it again. 8 SF 97. She also had had trouble with her memory of details, and was on muscle relaxer and some other medications at the time. 8 SF 97-98. She had done her best to remember what Brandi told her. 8 SF 98-102.

The written statement Mrs. Mancel provided said that she spoke with Brandi around 10:15 a.m. on April 13, 1994, when Brandi came to her classroom to discuss a big problem. 8 SF 120-121. Brandi explained that her father was supposed to have her on Wednesday, but he had called and asked her mom if she could come on Tuesday instead. *Id.* The reason for this change was that it was Brian Forester's birthday, a friend of her father's, and her father was throwing a birthday party for him. *Id.* Mrs. Mancel's statement went on to say that Brian kept bothering Brandi, doing suggestive things to her, so she went to her room to get away from him after the partygoers began taking drugs, Franklin had then come to her bedroom, asked when he was going to get his birthday present, and proceeded to attack her. 8 SF 122-123. According to Mrs Mancel's statement, Brandi screamed but nobody cared. 8 SF 123. She broke her guitar hitting him with it and managed to get outside and over the fence using a trash can, but he met her on the other side and raped her outside in the yard, covering her mouth with his hand so hard that she had a sore jaw. *Id.* The statement also detailed how he had been bothering her for some time, for instance when her dad and his friends rode their motorcycles to Waco. 8 SF 122. To Rachall's knowledge, Franklin did not have a motorcycle, and Rachall had never seen Brandi on a motorcycle with Franklin. 8 SF 211.

At trial, Mrs. Mancel recalled that Brandi told her that a man by the first name of Brian had raped her, but she could not recall

the last name, that it occurred at her father's house, that drugs were involved, that he attacked her in her bedroom and raped her in the backyard. 8 SF 103-105. She remembered having a conversation in May with someone, telling them that she had become somewhat confused when pressed to provide details, because her main focus was on the fact that Brandi had been hurt. 8 SF 105-106.

J. Aftermath

Brandi was in the top percentile of her class. 9 SF 8. Her mother thought that she was a perfect child. 9 SF 8. Brandi was thoughtful and considerate, had an overwhelming sense of right and wrong, and was a border-line perfectionist. 9 SF 9. Since the assault, Brandi had attended counseling, began wearing baggy clothing, stopped playing outside, become terrified about going into the backyard and reluctant to sleep in her bedroom, and began having nightmare. 9 SF 27-29.

II. Evidence Presented at State Writ Evidentiary Hearing

At the evidentiary hearing, Franklin called Matthew Rachall, Constance Patton, and Dr. Lamb, all of whom had testified at his trial, as well as Rose Anna Salinas, one of the prosecutors at his trial, Eric Joseph Holden, who had conducted a polygraph examination pre-trial, and Brian Franklin, the petitioner. The State called Brandi Rachall.

Brandi maintained that all of her answers were truthful at trial except her response to the one question whether she had ever had sex before. 4 SWH 125. Franklin did rape her, at her father's, at the side of the house, and it was painful. 4 SWH 124-26. When she lied at trial, she was thinking that her stepfather was right outside, she was scared of him, he was always with her, and she did not feel that she could tell anyone what had happened. 4 SWH 126-27, 130-33. Furthermore, her stepfather was physically abusive to her mother and others in the house. 4 SWH 129-30.

When she told him about Franklin's assault, he was mad and said it was her fault. 4 SWH 133. She confirmed the details of the sexual abuse that she had provided in her affidavit. 4 SWH 137-140. She also testified that her stepfather told her to make sure to clean up any blood evidence of his abuse, but that she only found blood two or three times and there was never as much as there was when she was assaulted by Franklin. 4 SWH 154-158.

Brandi did not remember anyone specifically asking if she had previously had sex until trial, not the police, CPS, or Dr. Lamb. 4 SWH 145-48. If Dr. Lamb asked her, then she said no, but she didn't remember her asking. 4 SWH 170. Brandi did not think that her failure to disclose would interfere, because she had made excuses to keep her stepfather from raping her after spring break and knew she had not had sex since the assault. 4 SWH 143, 171-72. She said that telling the jurors that she had not had sex did not change the fact that Franklin had assaulted her. 4 SWH 169.

Brandi did not have trouble sleeping until Franklin raped her. 4 SWH 167. Her nightmares were only about Franklin's assault. 4 SWH 167. Her stepfather's abuse troubled her, but it was different. 4 SWH 167. She did not seek counseling regarding her stepfather's abuse and had not told the counselor she was seeing after Franklin's assault about her stepfather's abuse. 4 SWH 164, 166. She did not tell anyone about her stepfather's abuse until 1998, and continued to lie about it to her aunt until1998 when she went to live with her while her mother was getting divorced. 4 SWH 148, 174-75.

Brandi did not tell Mrs. Mancel that she was to be Franklin's birthday present, or that her mother called her a slut, but acknowledged that she lied about her sexual history to anyone who asked and did so because she felt her stepfather would harm her if she did not continue to cover it up. 4 SWH 176-77.

The prosecutor testified that Brandi's sexual history was one of the most important factors in evaluating how to present the case, what evidence to introduce. 3 SWH 3, 36. She found Brandi to be so credible that she believed her even when faced with the results of Franklin's polygraph examination. 3 SWH 47. She acknowledged that her evaluation of the case was also influenced by evidence of Franklin's prior inappropriate sexual history which had been properly excluded as evidence. 3 SWH 47. She testified that, had she known that Brandi was also being sexually abused by her stepfather, she would not have been able to introduce the medical evidence, pointing out that Dr. Lamb did not have any information about the additional sexual abuse. 3 SWH 19, 32. The prosecutor said that based upon her interviews with Brandi, she was not afraid to ask whether she had had sex before, and wanted to establish she was sexually naive. 3 SWH 26.

If the prosecutor had found out about the perjury in the middle of trial, there is a strong possibility that she would have moved to dismiss the case. 3 SWH 37, 71. She believes that she used evidence that the prosecution would not have been entitled to use if the additional abuse had been known, and that the use of such evidence affected the integrity of the jury verdict and deprived Franklin of a fair trial. 3 SWH 38, 68, 70. The prosecutor was not saying that she believed Franklin was innocent. 3 SWH 46, 62.

The prosecutor acknowledged that the majority of the cases she tried were without medical testimony and she had gotten convictions on every case except one. 3 SWH 34, 39. In Franklin's case, the existence of another perpetrator would not have prevented her from prosecuting the case without the medical evidence, if she had found Brandi credible, because there was other evidence directly linking the assault to Franklin. 3 SWH 45-6. She testified that if Brandi had disclosed the abuse, she would have prosecuted the case. 3 SWH 46.

The prosecutor said she was not sure if she could find Brandi credible after her perjury. 3 SWH 73-74. However, she acknowledged that she had not spoken to Brandi since finding out about her perjury to reevaluate her credibility. 3 SWH 73-74. She said that, if it had it come out at trial, she would have sat down to reevaluate the case and if she had found Brandi credible would have determined if there was a way to proceed with the prosecution. 3 SWH 73-74.

Dr. Lamb testified that her physical findings would have been the same, but if she had known about the additional ongoing abuse, she would have said the findings were consistent with blunt force trauma instead of consistent with history. 5 SWH 9-10, 20. She testified that her findings are still consistent with the allegations, and also consistent with ongoing sexual abuse. 5 SWH 14-20. Brandi's two allegations do not invalidate each other. 5 SWH 20. Dr. Lamb could not say what caused the injuries, nor did she say in her previous testimony; she never ascribed the physical findings solely to Franklin. 5 SWH 14. Dr. Lamb did not ask Brandi about any other sexual abuse. 5 SWH 26.

Dr. Lamb found Brandi's statements to be credible then, and learning that she was also abused by her stepfather did not change her assessment that Brandi was credible. 5 SWH 31. She was not surprised that Brandi did not disclose the abuse. 5 SWH 21. Most women do not disclose their sexual assaults, neither do children. 5 SWH 29. Furthermore, it is common even when disclosing one part of abuse to withhold others, depending on the fallout. 5 SWH 29. Domestic abuse is present in sixty-one to sixty-five percent of documented sexual abuse cases. 5 SWH 30. Children who have been sexually victimized are much more easily revictimzed. 5 SWH 31. Sometimes sexually abused children do not even consider the abuse to be sex. 5 SWH 33. She said you have to look at the context in which Brandi testified that she had not had sex. 5 SWH 33. Dr. Lamb did acknowledge that false claims of

abuse are more common in adolescence than in younger children and are more common where the child is in a chaotic situation, such as unstable divorce. 5 SWH 22.

Rachall confirmed that he did not remember seeing Franklin at his house on March the 11th through the 13th, but could not say for sure whether he was or was not there. 4 SWH 27, 34, 46. Rachall did not remember that it rained that weekend. 4 SWH 35. Rachall also testified that it took about 45 minutes to drive from his house to Franklin's house. 4 SWH 41.

Patton, the medical examiner who had testified about the color of blood at trial, testified that a stain a week old would definitely be brownish color. 4 SWH 52, 56, 58. She also said that, as described, the blood would have been put on the panties within the past twenty-four hour time period. 4 SWH 56-57.

Franklin testified that he had never had any sexual contact with Brandi. 4 SWH 61. He testified that it rained both March 12th and 13th, pointed to the State's trial exhibit 14 weather report showing that there was precipitation both days, and said Rachall's backyard would have been muddy all weekend.[3] 4 SWH 72-73.

On March 12th, Franklin took his children to Kroger, making a purchase at 3:28 p.m., and then to Target, purchasing something at 4:45 p.m., then back to his apartment to cook dinner, watch TV, and work out in the weight room. 4 SWH 75, 79-80. On Sunday, he took his children to Eckerds, got gas at Texaco, went to Hulen Mall where he made a purchase from the GNC at 3:31 p.m., and then played in some toy stores. 4 SWH 83-85. On Sunday he also worked out and went to the hot tub at his complex. 4 SWH 92. He testified that he did not go to Rachall's house. 4 SWH 85. He doesn't remember if he saw his girlfriend that weekend or not. 4

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[3] State's Exhibit 14 shows that on March 12th there was .05 total precipitation and on March 13th .20 total precipitation.

SWH 89. He did not remember Rachall coming by his apartment complex on March 17th. 4 SWH 104. Shannon was his babysitter on Friday night and that whole week, but he did not know her last name and could not locate her. 4 SWH 88. He would leave to work around 5:20 p.m. and get home past midnight. 4 SWH 107. He testified that he was positive that the only day in March that he was at Rachall's house was on the 6th. 4 SWH 110.

Holden testified about the pre-trial polygraph test that he had conducted on Franklin, which yielded a non-deceptive result, and how the questions he asked, based on an erroneous offense date, reduced the level of confidence in the results. 3 SWH 86-110. He also testified as to the possible admissibility of such evidence at trial. 3 SWH 86-110.

ARGUMENT

I. The Supreme Court need not grant certiorari because Franklin failed to make a showing of actual innocence and therefore the Fifth Circuit's denial of COA is not in conflict with any other Circuit.

Franklin failed to make a showing of actual innocence. No Circuit has held that a mere claim of actual innocence, as opposed to a showing of actual innocence, allows a federal habeas court to review the merits of an otherwise time-barred constitutional claim. Because these conclusions are not debatable by jurists of reason, the Fifth Circuit did not err in denying a COA, and this Court should not grant certiorari.

A COA may be issued only if Franklin "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court's dismissal is on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that

jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA requires more than the absence of frivolity or the existence of mere "good faith" on the petitioner's part. *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *Id.* at 336.

Under *Schlup*, if a habeas petitioner presents new evidence of innocence showing that a constitutional violation has probably resulted in the conviction of one who is actually innocent, the federal court may address the merits of his otherwise procedurally defaulted constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 314, 316 ,327 (1995).[4] To demonstrate the requisite probability, the petitioner must show, not merely that a reasonable juror could find that reasonable doubt exists in light of the new evidence, but that "it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of the new evidence." *Id.* at 327, 329.

However, for this Court's hypothetical *Herrera*-type innocence claim, which is itself a substantive constitutional claim, the Court determined that it would be appropriate to apply an extraordinarily high standard of review. *Id.* at 314-15, *citing Herrera v. Collins*, 506 U.S. at 419, 426.[5] This Court suggested that "a *Herrera*-type

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[4] Franklin failed to argue the merits of any underlying constitutional claim in his petition for writ of certiorari or in his petition for COA before the district court. Therefore, Franklin has waived any such claim. Thus, Franklin is not asserting a *Schlup*-type gateway claim to reach the merits of an underlying claim of constitutional error.

[5] This Court assumed in *Herrera* that a truly persuasive demonstration of "actual innocence" made after trial would warrant federal habeas relief if there were no state avenue open to process such a claim. *Schlup v. Delo*, 513 U.S. at 314 fn 28, *citing Herrera v. Collins*, 506 U.S. at 417; *Graves v.*

claim would have to fail unless the federal habeas court itself was convinced that those new facts unquestionably establish the petitioner's innocence." *Schlup v. Delo*, 513 U.S. at 317. This has been interpreted as imposing a "clear and convincing" standard. *Ex parte Elizondo*, 947 S.W.2d at 209.

What evidence the court reviews in assessing the petitioner's showing of innocence depends on whether the actual innocence claim is a gateway to the merits of a substantive constitutional claim and what new evidence is relevant to that claim, because it is the constitutional violation regarding that evidence which petitioner claims resulted in the conviction of one who is actually innocent.[6] The reviewing court must determine that the petitioner

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Cockrell, 351 F.3d 143, 151 (5th Cir. 2003), *cert. denied*, 541 U.S. 1057 (2004) (even if actual innocence claim could be basis for federal relief, only cognizable if there was no state procedure available for making claim). Texas habeas law recognizes claims of actual innocence. *Ex parte Elizondo*, 947 S.W.2d at 205. Franklin's *Herrera*-type innocence claim was reviewed and denied on state habeas. *Ex parte Franklin*, 44,521-01, at cover. Therefore, the Fifth Circuit's denial of COA was proper, because no reasonable jurist would find it debatable that Franklin had failed to state a valid claim of the denial of a constitutional right when the only claim he preserved was his noncognizable *Herrera*-type innocence claim.

[6] In all of the cases cited by Franklin for the proposition that evidence is only required to be newly presented, not newly discovered, the newly presented evidence the courts considered were relevant to the petitioner's underlying constitutional claim. *Schlup v. Delo*, 513 U.S. at 315, 324, 328, 331 (considered testimony of witnesses petitioner claimed counsel was ineffective for failing to call); *Calderon v. Thompson*, 523 U.S. 538, 549, 558, 562, 566 (1998) (considered additional impeachment evidence on underlying claim of ineffective assistance of counsel); *Souter v. Jones*, 395 F.3d 577, 583 (6th Cir. 2005) (considered evidence from bottle manufacturer, photos not introduced at trial, and affidavits reflecting altered opinions of expert witnesses based on that new information on ineffective assistance of counsel claim); *United States v. Davies*, 394 F.3d 182, 185, 191 (3rd Cir. 2005) (considered postconviction legal decisions "holding that a substantive criminal statute does not reach his conduct." on insufficient evidence claim); *Gomez v. Jaimet*, 350 F.3d 673, 679-680 fn 2 (9th Cir. 2003) (considered evidence petitioner claimed counsel was

has presented some new evidence of innocence, without which, "even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup v. Delo*, 513 U.S. at 316. Such evidence of innocence could be "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - - that was not presented at trial." *Id.* at 324. The reviewing court, "not bound by the rules of admissibility that would govern at trial," may "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.* at 327-28. The new evidence may "call into question the credibility of the witnesses presented at trial" and "the habeas court may have to make credibility assessments." *Id.* at 330.

The Fifth Circuit found that "Franklin has not shown that reasonable jurists would find the district court's resolution of his claim debatable or wrong," and denied his request for COA. Pet. App. B. Both panel and *en banc* reconsideration were denied. Pet. Apps. A, I. Therefore, the Fifth Circuit explicitly found that jurists of reason would not find it debatable whether Franklin had shown that no reasonable juror would find him guilty beyond a reasonable doubt in light of his newly discovered evidence.

Brandi's new testimony that she had been sexually abused by her stepfather, including penetration, prior to Franklin's assault directly impeaches her testimony that she had never before had

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ineffective for failing to present); *Griffin v. Johnson*, 350 F.3d 956, 960, 965 9th Cir. 2003), *cert. denied* 541 U.S. 998 (2004) (considered evidence relevant o ineffective assistance of counsel claim); *Nance v. Norris*, 392 F.3d 284, 291 8th Cir. 2004), *cert. denied* 126 S.Ct. 133 (2005) (no evidence was provided hat supported petitioner's assertions or any evidence petitioner claimed counsel vas ineffective for failing to discover and introduce); *Gandarela v. Johnson*, 286 F.3d 1080, 1082 (9th Cir. 2002), *cert. denied* 537 U.S. 1117 (2003) considered affidavits from potential impeachment witnesses on violation of confrontation clause).

sex. 9 SF 161. However, it did not directly affect the medical evidence, which Dr. Lamb testified remains consistent with Brandi's testimony of Franklin's assault. 5 SWH 9-10, 20. Dr. Lamb testified that she could not ascribe a cause for Brandi's injuries, but pointed out that she had never ascribed a cause for Brandi's injuries; she merely testified that they were consistent with blunt force trauma. 5 SWH 14. Therefore, Brandi's new testimony does not undermine the factual possibility that Franklin assaulted her.

Nor did any other evidence Franklin presented establish that the offense was factually impossible. Rachall could not testify that Franklin was not at his house March the 11th through the 13th, 1994, only that he did not remember. 4 SWH 27, 34, 46. The medical examiner's testimony did not factually preclude the assault, as the subjective nature of the description of the stain was noted. 4 SWH 58; 10 SWH 80. The testimony did not Franklin's receipts, bills, and employment time sheets also do not establish that Franklin was not at Rachall's house on those days as the sun was setting. 4 SWH 75, 79-80, 83-85, 92. Neither is the polygraph test conclusive. 3 SWH86-110. Furthermore, a reasonable juror might remain skeptical of the results of such a test. Moreover, the relevant portions of Franklin's own testimony, while conclusive if taken at face value, are self-serving and uncorroborated, and a reasonable juror might certainly find it lacking credibility. It cannot be said that it is clear and convincing, or more likely than not, that no reasonable juror would find Franklin guilty beyond a reasonable doubt by concluding that his testimony was not credible.

Although Brandi's conflicting testimony regarding her sexual history may call into question her credibility in general, it is not a question that is necessarily resolved against her. The prosecutor conceded that, if she had discovered the information during trial, she would have had to reevaluate Brandi's credibility, and if she still found her credible, would have determined how best to

roceed. 3 SWH 73. Dr. Lamb testified that Brandi's late isclosure, contradicting her earlier testimony, did not undermine r. Lamb's evaluation of Brandi's credibility regarding her legations that Franklin assaulted her. 5 SWH 21. She indicated at it was normal for children of abuse to not disclose the abuse id even that victims of sexual abuse often do not consider the buse to be sex, as sex can carry a voluntary connotation. 5 SWH 3, 33. Therefore, it is at least more likely than not that some asonable juror would resolve the issue in favor of Brandi's edibility.

The credibility of Brandi's allegations against Franklin is also pported by circumstantial evidence which is not explained by e newly disclosed ongoing abuse by her stepfather. Brandi illed her mother the Monday of spring break, which was highly nusual when she was on visitation. 9 SF 13-15. Franklin eached his habit, and Rachall's expectations, of visiting Rachall hen they both had visitation during spring break. 8 SF 149-50. randi refused to get out of the car when they stopped by anklin's apartment the Thursday of spring break. 8 SF 151; 10 : 40. Brandi expressed, for the first time ever, a desire to not sit her father the very next visitation in early April. 9 SF 20, 0. Brandi did not sleep in her room at her father's house, hough she did go to visit. 8 SF 160. Brandi began wearing ggy clothing, stopped playing outside, became terrified about ing into the backyard, and began having nightmares. 9 SF 27-

In virtually every trial, jurors are faced with impeachment idence that they must weigh in making credibility terminations. Provided with general information about victims sexual abuse, as well as Brandi's testimony regarding the asons for her continued withholding, and the circumstantial idence supporting Brandi's allegations, it could not be said that was shown to be clear and convincing, or even more likely than t, that no reasonable juror would find her allegations against

Franklin credible and find Franklin guilty beyond a reasonable doubt.

None of the cases cited by Franklin would cause reasonable jurists to find it debatable whether Franklin had shown innocence. Even considering all of the evidence Franklin has presented, including that which he could have, but chose not to introduce at trial, Franklin has not made a *showing* of innocence.

Furthermore, all of the cases cited by Franklin, in which relief was granted, involved affirmative evidence of innocence, in some cases impeachment evidence, which struck at witness testimony regarding elements of the offense.[7] However, "speculative and *collateral* impeachment falls far short of showing actual innocence." *Gandarela v. Johnson*, 286 F.3d at 1086 (emphasis

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[7] *Schlup v. Delo*, 513 U.S. at 331 (found sufficient, witness statements stating petitioner was not involved in the offense and providing information casting doubt on factual possibility of his participation); *Souter v. Jones*, 395 F.3d at 583 (found sufficient, evidence bearing directly on factual possibility of petitioner causing the injuries with the proposed murder weapon); *Carriger v. Stewart*, 132 F.3d 463 at 468 (9th Cir. 1997) (found sufficient, not for *Herrera*, but for *Schlup*, confession of crime by State's key witness, petitioner's former prison acquaintance and contact with whom petitioner had been staying after he was released from a previous incarceration, a regular yet unreliable informant for the police, and the informant in the robbery and murder investigation which led to petitioner's conviction); *Lewis v. Erickson*, 946 F.2d 1361, 1362-63 (8th Cir. 1991) (granted relief pre-*Herrera* based on complainant's recantation, in a co-defendant's trial, of her testimony that there was no doubt in her mind that the defendant had attacked her, when at petitioner's trial she had not distinguished between her ability to identify the two perpetrators, recantation bore on both witness's credibility and directly on defendant's guilt); *Richter v. Bartee*, 973 F.Supp 1118, 1130 (D. Neb. 1997) (found sufficient, evidence that complainant had made a strikingly similar allegation of sexual assault a year later which had been affirmatively discovered to be false, and medical testimony regarding the complainant's personality disorder stating that it would have affected her at the time she made allegations against petitioner); *but see Gandarela v. Johnson*, 286 F.3d at 1086 (found insufficient, affidavits of possible witnesses regarding possible motivating factors for the accusations made by the complainant and evidence of her general character for truthfulness).

added). Thus, while credibility determinations may well be determinative of guilt or innocence, Franklin has not demonstrated that it is debatable whether Brandi's testimony on a collateral matter, such as whether she had previously had sex, an issue which is generally not admissible at a trial for sexual assault, Texas Rule of Evidence 412(b), would provide clear and convincing evidence, or even make it more likely than not, that no reasonable juror would find guilt beyond a reasonable doubt. The fact that Dr. Lamb does not find Brandi's credibility regarding Franklin's assault to be undermined, exposes the unreasonableness of any such argument. 5 SWH 31. Based on the research to which Dr. Lamb referred, it is more likely than not that at least some reasonable jurors would likewise find Brandi's allegations of Franklin's assault credible even in light of Franklin's new evidence.

Franklin failed to make a showing of innocence about which reasonable jurists would debate whether he had demonstrated that it was clear and convincing, or even just more likely than not, that no juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict. *Schlup v. Delo*, 513 U.S. at 331. Further, no Circuit has held that a mere allegation of innocence, as opposed to a showing of innocence, is sufficient to excuse a petitioner from the AEDPA time limitations for filing a federal petition. Therefore, the Fifth Circuit's denial of COA was proper and did not create a conflict amongst the Circuits. This Court should not grant certiorari.

I. The Supreme Court need not grant certiorari because Franklin should not be excused from failing to file within the one-year AEDPA limitations period under any innocence exception.

Even if this Court is inclined to address the issue of whether there is an actual innocence exception for an otherwise time-barred claim, this is not the case in which recognizing such an exception

would prevent a miscarriage of justice or alleviate inequity. Any exception to the AEDPA limitations must require some degree of diligence. Franklin's complete lack of respect for, and lack of diligence to comply with, the AEDPA limitations renders this case further inappropriate for equitable remedies. Furthermore, the Fifth Circuit did not reach this issue. Therefore, this Court should not grant certiorari.

Under the AEDPA, the limitations period runs from the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence, providing a petitioner who is actually innocent one year in which to bring new evidence of innocence to the federal courts. § 2244(d)(1)(D). Further, if there is some impediment to filing an application, which is created by State action in violation of the Constitution or laws of the United States, the limitations period does not begin to run until such impediment is removed. § 2244(d)(1)(B). Moreover, the one-year period is statutorily tolled while state post-conviction or other collateral review is pending. § 2244(d)(2).

These provisions balance the inmate's interests in proving his innocence, or obtaining a new trial free of constitutional error, against the State's interests in finality and in the ability of the State to retry the case if the petitioner is indeed granted relief. When a petitioner learns of a factual predicate for a claim which he could not, through due diligence, have learned of sooner, it does not matter how stale the State's case or evidence is, the petitioner has one year in which to file a federal habeas petition.

In addition to the provisions of the statute, if a petitioner can demonstrate both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance has stood in his way," he may be entitled to additional tolling of the limitations period as a matter of equity. *Pace v. Diguglielmo*, 125 S.Ct. 1807, 1814 (2005). Although this Court has never squarely

addressed the question, the Fifth Circuit has applied equitable tolling to the AEDPA's statute of limitations. *Pace v. Diguglielmo*, 125 S.Ct. at 1815 fn 8; *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). Therefore, equitable considerations may toll the limitations period where a situation not envisaged by Congress arises.

However, actual innocence is not a situation Congress failed to consider in drafting the AEDPA. A year after this Court recognized the *Schlup*-gateway innocence claim excusing a procedural default without a showing of cause based on a showing of actual innocence, Congress enacted the AEDPA. Pub. L. No. 104-132, 110 Stat. 1214 (1996). While Congress explicitly provided an actual innocence exception to overcome the prohibition against filing a successive petition and to be entitled to an evidentiary hearing, Congress did not provide for such an exception in the AEDPA statute of limitations. 28 U.S.C. § 2244(b)(2)(B), §2254(e)(2), 2244(d). Furthermore, even where Congress did provide an actual innocence exception, Congress did not make it absolute, but required that the petitioner also be able to demonstrate that the factual predicate for the constitutional claim could not have been discovered previously through the exercise of due diligence. 28 U.S.C. § 2244(b)(2)(B); § 2254(e)(2).

Therefore, even if a petitioner is able to demonstrate a sufficient showing of actual innocence, unless the petitioner is also required to demonstrate that he has been diligently pursuing his remedies, allowing courts to grant relief on an otherwise time-barred claim would eviscerate the statute of limitations. Likewise, even with a showing of actual innocence, without a showing of diligence in attempting to bring the claim within the appropriate limitations period, or some rare and exceptional circumstance preventing such diligence, the petitioner would not have demonstrated that equity demands that his underlying claims be heard.

In this case, Franklin, represented by counsel who was well aware of the AEDPA limitations period, took thirteen months from the time he learned of Brandi's allegations against her stepfather to file his state application for writ of habeas corpus. *Ex parte Franklin*, at 2, 32. Because the limitations period had already expired by the time the state writ was filed, the time that it was pending did not statutorily toll the limitations period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000) (where state habeas application not filed until after federal limitation period has run, filing does not toll limitation period). Even after the Court of Criminal Appeals denied his application, instead of immediately filing his federal petition, he delayed another seventeen months. *Ex parte Franklin*, at cover; Fed Writ Pet.

While Franklin claims to have been diligently pursuing his claim by developing additional evidence to support it, mere action does not establish diligence. In this case, Franklin's alleged diligence during the seventeen months after his state writ was denied included conducting additional discovery, investigation, and evidence creation, tangential or irrelevant to his claim of actual innocence based on Brandi's allegations against her stepfather. This action included Franklin submitting to and obtaining the results of a polygraph test and obtaining a juror affidavit, both of which would be inadmissible in federal court. Further, the juror affidavit did not establish that no reasonable juror would have found him guilty beyond a reasonable doubt under any standard; at most it might have demonstrated that a particular juror, viewing the additional evidence without the benefit of an adversarial proceeding and making assumptions based upon that evidence, would not have found him guilty. Franklin's initial action, before filing his state application, also included gathering similar tangential and irrelevant evidence, such as the prosecutor's affidavit and his own receipts and employment time log, which were available but not introduced at trial. This action does not demonstrate diligence in pursuing relief on a legitimate claim, but mere action in manufacturing a claim to

present.

This is not a case in which equity would be served or manifest injustice avoided by excusing the petitioner from his failure to file his federal petition within the time provided by the carefully crafted provisions of the AEDPA. Franklin has not demonstrated any circumstance rendering the one-year limitations period insufficient to bring his claim.

The Supreme Court should not grant certiorari.[8]

CONCLUSION

Because the Fifth Circuit Court of Appeals' denial of COA was proper, no special or important reason for granting certiorari exists. Accordingly, the Director respectfully requests that this Court deny Franklin's petition.

Respectfully submitted,

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[8] Moreover, there is no split amongst the Circuits on this issue, as Franklin claims, because only one Circuit has rendered a decision on the issue. *Souter v. Jones*, 395 F.3d at 580 (found requisite showing of innocence excused time-bar and remanded for consideration of the merits of his underlying constitutional claims); *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003) no innocence claim raised); *United States v. Montano*, 398 F.3d 1276, 1278, 1285 (11th Cir. 2005) (remanded for consideration of innocence); *David v. Hall*, 318 F.3d 343, 347-48 (1st Cir. 2003), *cert. denied* 540 U.S. 815 (2003) failed to make predicate showing of actual innocence); *Rouse v. Lee*, 339 F.3d 238, 251-253 (4th Cir. 2003) (actual innocence claim not raised); *Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (failed to make showing of actual innocence).

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In The
Supreme Court of the United States

BRIAN EDWARD FRANKLIN,

Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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I. This Court should grant Petitioner certiorari because it recently granted certiorari in *House v. Bell*, which raises similar issues.

On June 28, 2005, this Court granted certiorari in *House v. Bell*, 04-8990, on the following two issues:

1. Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts – merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial?

2. What constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

This Court should grant Petitioner certiorari because he raises similar issues. Like House, Petitioner has raised at least a colorable claim of actual innocence. While House contends the lower courts erred in applying *Schlup v. Delo*, 513 U.S. 298 (1995) and *Herrera v. Collins*, 506 U.S. 390 (1993) to determine his innocence, Petitioner argues the lower courts erred in applying *Herrera v. Collins*, 506 U.S. 390 (1993), in determining his actual innocence. Both House and Petitioner raise the issue of what constitutes "actual innocence" under *Herrera*.

Respondent at p. 20-21 n. 5 contends Petitioner should be denied certiorari because he raises a free-standing

actual innocence claim that is not cognizable in federal court. However, this argument fails for three reasons:

1. Respondent never made this argument below and federal courts in Petitioner's case addressed his actual innocence because it was raised in the context of 28 U.S.C. § 2254. *See* Pet. App. A-D, I.

2. The *Herrera* concurrence suggests, various federal appeals courts have read it to suggest, and the Texas Court of Criminal Appeals has held, that such a claim implicates the due process clause of the United States Constitution. *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 476-78 (9th Cir. 1997); *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1995); *Ex parte Elizondo*, 947 S.W.2d 202, 204 (Tex. Crim. App. 1996).

3. In granting certiorari on the second issue in *House*, this Court recognizes that a bare innocence claim may be cognizable.

II. Respondent improperly seeks to re-litigate the historical facts contrary to the State district court's findings after a full and fair hearing.

28 U.S.C. § 2254(e)(1) states in part that "a determination of a factual issue made by a State court shall be presumed correct," unless clear and convincing evidence rebuts this presumption. Federal courts must presume correct the State district court's explicit and implicit factual findings and credibility determination when the trial court held a full, fair, and live evidentiary hearing. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Craker v. Procunier*, 756 F.2d 1212 (5th Cir. 1985). Federal courts

cannot reject the State district court unless they "conclude that the state [district] court's findings lacked even 'fair support' in the record." *See, e.g., Marshall v. Longberger,* 459 U.S. 422, 432-34 (1983).

The State district court held a full and fair live hearing, yet respondent improperly seeks to re-litigate (Respondent's Brief in Opposition at pp. 22-26) the historical facts contrary to the State district court's findings. Even the lower reviewing courts, although they ignored some of the State district court's findings of historical facts, did not challenge their accuracy. Pet. App. A-E, I. The State district court held a habeas corpus hearing that spanned several days and that included many exhibits and witnesses, including Petitioner, lead prosecutor Salinas, and the complainant and her family. Pet. App. F. Based on all of this evidence, along with the witnesses' demeanor, the State district court made extensive written factual findings and legal conclusions, replete with record citations and firmly supported in the record, finding Petitioner actually innocent. *Id.*

III. Respondent incorrectly contends that the complainant's perjury was merely collateral.

Respondent incorrectly contends that the complainant's perjury was merely collateral. This Court held in *Schlup* that "the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Schlup*, 513 U.S. at 330. This Court has unanimously held that the "jury's estimate of the truthfulness and reliability of a given witness may

well be determinative of guilt or innocence . . . " *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

The State district court found that the complainant's perjury, given the tenuous trial evidence, struck at the heart of the prosecution's case and proved Petitioner's innocence. Pet. App. F. In granting relief based on Petitioner's actual innocence, the State district court suggested that *all* of the complainant's trial testimony was false and that she lacked *all* credibility. *Id.* The State district court hardly considered this crucial evidence of perjury as just "a collateral matter," as the Court of Criminal Appeals and federal courts did and as Respondent does. *Id.* Further, Respondent fails to persuasively distinguish *Lewis v. Erickson*, 946 F.2d 1361 (8th Cir. 1991), or *Richter v. Bartee*, 973 F. Supp. 1118 (D.Neb. 1997), examples of cases in which a lack of the complainant's credibility sufficiently proved the state petitioner's actual innocence.

IV. Respondent wrongfully claims that Petitioner failed to exercise *any* diligence in meeting the one-year limitations under AEDPA and that there is no appellate conflict regarding this limitations.

Respondent at p. 26-30 wrongfully claims that Petitioner failed to exercise *any* diligence in complying with the one-year deadline under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. As Petitioner explained in his second amended federal habeas petition, he spent a great deal of time investigating, researching, and preparing a State habeas application, including:

1. Reading the 13-volume trial record.

2. Examining the investigative documents and photographs the prosecutor provided Petitioner regarding his case and the case of stepfather John Guerrero.

3. Reviewing Petitioner's appellate briefs and opinion.

4. Locating, investigating, and interviewing the trial participants.

5. Investigating and reviewing the Tarrant County criminal cases against stepfather John Guerrero that were filed as a result of the complainant and her brother's sexual abuse allegations.

6. Researching law from all federal jurisdictions and states, since Texas law regarding post-conviction actual innocence claims was unclear, if not contradictory, at the time. For example, while the Texas Court of Criminal Appeals in the 1996 case, *Ex parte Elizondo*, 947 S.W.2d at 202, granted relief in a habeas application based on the complainant's recant in a sexual assault case, the same court summarily denied relief a year later in a virtually identical case, *Ex parte Stevens*, 963 S.W.2d 75 (Tex. Crim. App. 1997).

If the habeas application had been filed earlier – without the proper factual or legal support – it risked being summarily denied and a subsequent habeas application barred under Texas Code of Criminal Procedure Chapter 11. Put differently, if Petitioner had filed a boilerplate or "bare bones" habeas application, or a habeas application based on specific facts and issues that had not yet been exhaustively researched, a possibility existed that

the trial court would have outright denied his habeas application, causing him to lose his "one bite at the apple."

Following the Court of Criminal Appeals' opinion and before filing his federal writ, Petitioner conducted an additional investigation, which he also set out in his second amended federal writ, including:

1. Locating, investigating, and trying to interview Darrin McMund, who contacted police while Petitioner's state habeas application was pending in the Court of Criminal Appeals. McMund told police that the complainant's mother and the complainant made up the allegations against Petitioner.

2. Following further investigative leads.

3. Hiring licensed polygrapher John Swartz to polygraph Petitioner.[1]

4. Locating, investigating, and interviewing jurors, including Percy Mitchell, who signed a seven-page affidavit that he would have acquitted Petitioner had he been aware of the new evidence of complainant's perjury.

5. Obtaining an updated affidavit from prosecutor Salinas re-affirming that Petitioner had an unfair trial.

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[1] Respondent at p. 29 incorrectly contends polygraphs are inadmissible in federal courts. *See, e.g., Gibbs v. Gibbs*, 210 F.3d 491, 499-00 (5th Cir. 2000); *Ulmer v. State Farm Fire & Cas. Co.*, 897 F.Supp. 299 (W.D. La. 1995).

Further, 28 U.S.C. § 2244(d)(1) states in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> * * *
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Obviously, Petitioner raises actual innocence as an exception to the one-year limitations because of the lower federal courts' finding that Petitioner discovered the factual predicate (the complainant's perjury) over a year before he filed his federal petition. To the extent that Respondent claims Petitioner failed to exercise *due* diligence, it is irrelevant in the context of Petitioner's claim of an actual innocence exception.

Finally, Respondent wrongfully claims at p. 30 n. 8 that no appellate conflict exists regarding whether actual innocence tolls or is an exception to the one-year limitations under AEDPA. Respondent concedes that the Sixth Circuit, in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), held that actual innocence tolls the one-year limitations under AEDPA. Other federal appellate courts, however, have implicitly or explicitly ruled regarding such an actual innocence exception, including:

1. The Tenth Circuit in *Burger v. Scott*, 317 F.3d 1133, 1141 (10th Cir. 2003), held that "we have limited equitable tolling of the one-year limitations period to 'rare and exceptional circumstances. Therefore, [e]quitable

tolling would be appropriate, for example, when a prisoner is actually innocent . . . '" (citations omitted).

2. The First Circuit in *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003), held that "the statutory limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence even though Congress clearly knew how to provide such an escape hatch . . . A couple of cases have conjectured that actual innocence might override the one-year limit; but to us these dicta are in tension with the statute and are not persuasive." (citations omitted).

3. The Fourth Circuit in *Rouse v. Lee*, 339 F.3d 238, 251-53 (4th Cir. 2003), held that the test for equitable tolling would not consider a petitioner's underlying claim, therefore foreclosing equitable tolling based on an actual innocence claim, and that equitable tolling only applies to AEDPA "when extraordinary circumstances beyond the petitioner's control prevent him from filing a timely petition."

4. The Seventh Circuit in *Gildon v. Bowen*, 384 F.3d 883, 887 (7th Cir. 2004), adopted the Eighth Circuit's approach in *Flanders v. Graves*, 299 F.3d 974 (2002), set out below, regarding an actual innocence exception.

5. An en banc Eighth Circuit in *Flanders*, 299 F.3d at 976-78, held:

   In the past, we have declined to address the question of whether a petitioner's 'actual innocence' is a circumstance sufficient to the toll the statute of limitations. Today, we hold that it is not, at least in the circumstances of

> this case * * * We do not hold that actual innocence can never be relevant . . . For such a claim to be viable, though, a petitioner would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.

V. Conclusion.

The petition for writ of certiorari therefore should be granted.

Respectfully submitted,

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